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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No : IT-03-67-T

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IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, Presiding**
Judge Mandiaye Niang
Judge Flavia Lattanzi

Registrar: **Mr John Hocking**

Judgement rendered on: **31 March 2016**

THE PROSECUTOR

v.

Vojislav Šešelj

PUBLIC

PARTIALLY DISSENTING OPINION OF JUDGE FLAVIA LATTANZI – AMENDED VERSION

Volume 3

The Office of the Prosecutor:

Mr Mathias Marcussen

The Accused:

Vojislav Šešelj

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I. THE GENERAL CLIMATE OF INTIMIDATION

1. I regret that I have to begin my partially dissenting opinion by specifying that the adverb 'partially' here is more of a euphemism. In fact, unusually for a dissenting opinion, I disagree with the majority of the Chamber on almost everything: the description of the context, the use of the evidence, the flawed or, at best, cursory analysis of the evidence, the disregard for the jurisprudence, and the conclusions.

2. Nor do I subscribe to the severe criticism of the Prosecutor, his Indictment and all his subsequent submissions.

3. It is true that the Prosecutor should have done better. However, in my opinion, it is above all the Chamber – in its former, as well as present composition – that should have done better, despite the complexity of the case and the difficulties we encountered, especially regarding the Accused's behaviour with the witnesses and his obstruction of the proceedings.

4. These difficulties have led to various contempt proceedings before the Tribunal, three of which resulted in convictions of the Accused to a total of nearly five years of imprisonment for revealing the identities of certain protected witnesses,[1] which had clearly been a strategy of intimidation on his part. Another proceeding against the Accused's closest collaborator, the Chief of the SRS War Staff, Ljubiša Petković, resulted in a sentence of four months' imprisonment for the latter after he had made various previous statements in favour of the Prosecution[2] that seriously incriminated the Accused. Another proceeding for intimidation of witnesses in the main case against the Accused and the last contempt case against him led to the issuance of arrest warrants for two members of his defence team and for one of his former associates.[3] These proceedings are currently pending before the Tribunal because Serbia has yet to execute these arrest warrants.

5. All these proceedings attest to a climate of intimidation, blackmail, threats and fear to which the Prosecution witnesses have been subjected. This climate was also discernible during the testimonies in court from both those who displayed true courage by coming to testify for the

[1] *The Prosecutor v. Vojislav Šešelj,* Case IT-03-67-R77.2, "Public Edited Version of 'Judgement on Allegations of Contempt' Issued on 24 July 2009", 27 January 2010; *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-R77.2-A, "Judgement", 22 August 2011; *The Prosecutor v. Vojislav Šešelj,* Case IT-03-67-R77.3 "Public Redacted Version of 'Judgement' Issued on 31 October 2011", 4 April 2012; *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-R77.3-A, "Judgement", 29 January 2013; *The Prosecutor v. Vojislav Šešelj,* Case IT-03-67-R77.4 "Public Redacted Version of Judgement Issued on 28 June 2012", 13 July 2012; *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-R77.4-A, "Public Redacted Version of 'Judgement' Issued on 30 May 2013", 7 August 2013.

[2] *In the matter of Ljubiša Petković*, Case IT-03-67-R77.1 "Redacted Version of Judgement Pronounced on 11 September 2008", 11 September 2008; C11; C12; C18.

[3] *The Prosecutor v. Petar Jojić et al.*, Case IT-03-67-R77.5, "Order Lifting Confidentiality of Order in Lieu of Indictment and Arrest Warrants", 1 December 2015.

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Prosecution, as well as those who appeared after being called by the Prosecution and consented to testify, only to retract their previous statements given to the Prosecutor once in court.

6. The numerous statements "given" to the defence team by individuals, some of whom were already on the 65 *ter* list of Prosecution witnesses, provide further proof of the climate of intimidation that reigned over the trial.[4] The purpose of these statements was to refute evidence given *viva voce* and they frequently arrived by fax – in Serbian – the day, or several days, after the testimony. The Chamber decided to stop admitting them due to their lack of reliability and *prima facie* probative value. The Accused, however, read them out in the courtroom so they are recorded in the transcripts of the hearings.

7. And yet, the majority completely – and erroneously - ignored this climate of intimidation in its preliminary assessment of weight to be accorded to different pieces of evidence that was necessary to arrive at its conclusions.[5]

II. INADEQUATE REASONED OPINION

8. In the *Bizimungu* Appeal Judgement, it is clearly established that:

> Under Article 22(2) of the Statute and Rule 88(C) of the Rules, trial chambers are required to provide a reasoned opinion. Accordingly, a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused. A reasoned opinion in the trial judgement is essential to ensuring that the Tribunal's adjudications are fair, and, *inter alia*, allows for a meaningful exercise of the right of appeal by the parties, and enables the Appeals Chamber to understand and review the trial chamber's findings.

9. It is therefore clear that a judgement must contain a reasoned opinion addressing points of law and fact, not only for an accused when he is convicted, but also for the Prosecutor when the accused is acquitted. It is only by virtue of this reasoning that subsequently the two parties are able to exercise in full their right to lodge an appeal of the judgement and that the Appeals Chamber can comprehend and review the findings reached by the Trial Chamber.

10. I found it extremely difficult to understand the majority's line of reasoning on many points, on account of its failure to provide sufficient reasons.

[4] *See* for example VS-033, T(E) 5576-5577; Asim Alić, T(E) 7140; VS-1055, T(E) 7851-7855; Perica Kolbar, T(E) 8132-8134; VS-2000, T(E) 14101-14103; VS-067, T(E) 15496.
[5] Judge Mandiaye Niang was probably unaware of this because he did not attend the hearings.

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11. For example, with regard to its reasoning on the widespread or systematic attack as a contextual element of crimes against humanity, the majority maintains that "it did not receive sufficient evidence to irrefutably establish" the existence of such an attack, because "the evidence that was presented and examined points rather to an armed conflict between enemy military forces, with some civilian components". Is this supposed to mean that all the civilians were combatants? It is not clear. Be that as it may, I can confirm that the Chamber received ample evidence on the widespread and systematic attack in Croatia and in BiH, and sufficient evidence to conclude that such an attack existed, including in Vojvodina. Furthermore, I note that, even though the majority states in the Judgement that the evidence submitted was examined, this evidence is cited only in a disorderly manner in the footnotes, without a real analysis allowing for an understanding of how the majority arrived at such a conclusion.

12. Another example can be seen in the section on instigation wherein the majority of the Chamber made a particularly cursory analysis of the evidence relating to the *actus reus* of this accessory form of alleged responsibility, from which it is impossible to understand why it lent more weight to one piece of evidence rather than another, or why it accorded no weight at all to the evidence showing that the Accused exerted a great influence on his followers and the SRS volunteers involved in the crimes. It is also hard to understand why in its analysis the majority failed to take into account important elements such as the means used by the Accused to influence the behaviour of the perpetrators of crimes, the repetition of the same incriminating discourse over time, the general background of the disintegration of the former Yugoslavia and the extreme inter-ethnic tensions against which these acts took place, and the fact that the existing situation worsened following the speeches in dispute.

13. One last extremely revealing example of the inconsistent approach adopted by the majority and its failure to provide sufficient reasons: in the part of the Judgement dealing with the Accused's speech in Hrtkovci, the majority refers to Witness VS-061 as a witness who is, at the same time, both credible and not credible, jumping from one assessment to the other without any explanation whatsoever, except to say that when he was telling the truth he was not useful to the Prosecution case.[6] How did the majority determine when this witness was telling the truth and when he was not credible? This remains a mystery because no explanation is given, nor is his testimony confronted with any other evidence on the matter.

[6] Thus, at para. 195 of the Judgement, the majority refers in general terms to Witness VS-061, mentioning the problems posed by his evidence; in paras 196 and 341 it relies on his testimony, whereas in para. 333 it rejects it without explaining these contradictory approaches.

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14. As regards more particularly the applicable case-law, in the *Hadžihasanović* Appeal Judgement (para. 13), the Appeals Chamber had occasion to affirm that a Trial Chamber's obligation to provide a reasoned opinion "does not require a Trial Chamber to discuss at length all of the case-law of the International Tribunal on a given legal issue but only to identify the precedents upon which its findings are based".

15. Yet for the majority, the case-law of the Tribunal was not worthy of consideration, given that, as often as not, the majority failed to recall the applicable law.

16. Thus, there are few references to the case-law in the part on determining the conditions for the application of Article 5 of the Statute, where the requirement of the existence of an armed conflict and a widespread or systematic attack is only mentioned. Moreover, the majority thus arrived at unreasonable findings, such as the one rejecting the existence of an armed conflict in Vojvodina, or deeming that there was no widespread or systematic attack in Croatia and BiH, because there was "an armed conflict between enemy military forces, with some civilian components."[7]

17. The applicable law is not mentioned at all, for example, in the section on war crimes. This subsequently allows the majority to follow a line of reasoning that confuses a military attack that does not discriminate between military and civilian targets, with a military attack that is directed at military targets, but is disproportionate, involving wanton destruction or devastation, not justified by military necessity, of towns, villages and homes.[8]

18. Moreover, on the rare occasions when the majority does refer to the applicable law, as in the part concerning the responsibility of the Accused, it strays from the well-established jurisprudence of the Tribunal, without offering the slightest justification.

19. Furthermore, the majority employs a notion of instigation that does not conform to the one established by the Appeals Chamber of the Tribunal, without providing any explanation.[9] I understand that providing a consistent reasoned opinion would have been difficult in the light of the *Aleksovski* case-law which imposes an obligation on Trial Chambers to follow the law established by the Appeals Chamber, but the majority nevertheless had the duty to provide some explanation.

20. The same approach is adopted by the majority in relation to *dolus eventualis* as an alternative form of *mens rea* for instigation and aiding and abetting. This form of *mens rea* is not

[7] *See* para. 192 of the Judgement.
[8] *See* para. 204 and particularly footnotes 172 and 175.
[9] *See* para. 91 here below.

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mentioned at all in the applicable law by the majority, regardless of the fact that the case-law on this issue is also well-established.

21. Also lacking, in the part on the *actus reus* of instigation, is a reconstruction of the "hate speech" from the perspective that I shall deal with here below, in the section on physical commission.

III. ISSUES RELATING TO THE EVIDENCE

22. On the issue of the witnesses who completely or partially retracted their evidence given in prior written statements, the Chamber indicated that it had followed the guidelines set by the Appeals Chamber, which has stressed the importance of the Trial Chamber judges providing reasons, on a case-by-case basis, for relying on a prior written statement rather than on the witness's *viva voce* testimony.[10] Yet, the majority did not go on to explain why it had sometimes chosen to lend more weight to the prior written statements of these witnesses rather than to their *viva voce* testimony, or why, at other times, it had chosen to rely both on the testimony and the written statement of the same witness.[11] This is another example of inadequate reasoned opinion in the Judgement. For my part, I believe that - after a thorough, case-by-case examination of the totality of the admitted evidence, and in the light of the intimidating behaviour of the Accused during the court sessions that were broadcast in the Serbian media and on the SRS website, revealing the identities of protected witnesses - the proper course of action would have been to lend more weight to the prior written statements than to the *viva voce* testimony of these so-called "retracted" witnesses. This whole climate of intimidation led, moreover, to the issuance of an arrest warrant made public in December 2015 for two members of the Accused's defence team and one of his former associates, as I have already pointed out above.[12]

23. In addition, I disagree with the majority's decision to set aside the evidence admitted in respect of a consistent pattern of conduct based on the premise that it would have served no other purpose than to duplicate very similar charges.[13] I am rather of the opinion that the Chamber should have taken this evidence into consideration pursuant to the instructions set out in the Decision of 20

[10] *See* paras 26-27 of the Judgement.
[11] *See* for example para. 147 of the Judgement (relying on both the testimony of Witness Zoran Rankić and on his prior written statement P1076); para. 216, footnotes 197-198 of the Judgement (making reference to both the testimony of Nenad Jović and to his prior written statement P1077); para. 250, footnotes 269-270 and 275 of the Judgement (relying solely on the prior written statement P634 of Aleksandar Stefanović and the prior written statements P1077 and P1085 under seal of Nenad Jović).
[12] *See supra,* footnote 3.
[13] *See* para. 29 of the Judgement.

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September 2007, recalling that the evidence in respect of a consistent pattern of conduct could be used to: (i) prove the purpose and methods of the joint criminal enterprise charged in the Indictment, prove the degree of coordination and cooperation of individuals and institutions that are allegedly part of the joint criminal enterprise, the communication, training and transfer of volunteers and the involvement of the Accused; (ii) knowledge of the Accused of the conduct of the volunteers; and (iii) the general elements of the persecution campaign in Croatia as charged in Count 1 of the Indictment.[14]

24. I also disagree with the majority's decision which, in disregard of the Tribunal's jurisprudence,[15] failed to consider as relevant evidence the speeches made outside the period of the Indictment for the purpose of analysing the issue of instigation, as the majority decided that they should base the Judgement solely on the speeches made within the precise time frame set by the Prosecution.[16]

25. Finally, I note that, contrary to what had been decided on the issue of adjudicated facts – namely that these facts are based on a simple assumption that could be reversed by contrary evidence directly examined by the Chamber[17] - the majority totally or almost totally ignored these adjudicated facts, maintaining that they were contradicted by evidence in the case file, of which there is no trace whatsoever in the Judgement.[18]

IV. THE CONTEXT

26. Even the general context of the events covered by the Indictment was described by the majority of the Chamber in disregard of the evidence admitted to the record, which clearly shows that the difficulties in the coexistence of the three nationalities in the former Yugoslavia started mainly when Serbia, under the Milošević regime, tried to impose its hegemony on the other

[14] *See* footnote 10 of the Judgement; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Submission 311 Requesting that Chamber III Clarify the Prosecution's Pre-Trial Brief", 20 September 2007.
[15] The *Nahimana* Appeal Judgement, para. 315. It is well established that the provisions of the Statute on the temporal jurisdiction of the Tribunal do not preclude the admission of evidence on events prior to the period covered by the Indictment, if the Chamber deems such evidence relevant and of probative value and that there is no compelling reason to exclude it. For example, a Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at: clarifying a given context; establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in the period covered by the Indictment; demonstrating a deliberate pattern of conduct.
See also *Prlić,* "Decision on Slobodan Praljak's Motion for Clarification of the Time Frame of the Alleged Joint Criminal Enterprise", 15 January 2009, p. 9.
[16] *See* para. 301 of the Judgement.
[17] *See* para. 30 of the Judgement.
[18] *See* for example footnote 172 of the Judgement and the Decision of 8 February 2010, facts nos 44-122.

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Republics and communities. I cannot but briefly recall these events that preceded the process of secession in the light of the evidence received in the course of the trial.

27. The three constituent nationalities of the SFRY had initiated discussions for the purposes of the confederalisation of the six Republics or, alternatively, the peaceful secession from the federal State. These endeavours failed principally as a result of the rising hegemony of Serbia that Slobodan Milošević, Serbia's political leader, later President from May 1989, sought to impose on the other Republics in the name of defending Serbian interests.[19]

28. On 28 June 1989, on the occasion of the 600th anniversary of the Battle of Kosovo, Milošević presented himself as the protector and defender of Serbs in all of Yugoslavia, declaring that no one had the right to harm the Serbian people.[20]

29. The first tangible signs of the hegemony Milošević sought to impose had already appeared in 1988, when the authorities governing Vojvodina were removed and when, in 1989, the Republic of Serbia revoked the province's special autonomous status, as in the case of Kosovo, with the aim of their total integration into the Serbian Republic.[21]

30. Vojvodina, a province of Serbia bordering Croatia, specifically the areas of Eastern Slavonia, Baranja and Western Srem, with a considerable Croatian population, was thus deprived of its distinct identity among other Serbian provinces.[22]

31. While in 1990 Croatia and Slovenia continued to pursue the confederalisation of the SFRY, Serbia opposed this process, preferring a strengthening of central federal authority[23] and strove, together with the Serbs of Croatia and Bosnia, for the autonomy of territories claimed as Serbian in Croatia and in Bosnia.[24] The radicalisation of these diverging positions gave rise to the first instances of violence in these territories. It also led, on the one hand, Slovenia and Croatia to organise referendums on their future status in which, in December 1990 and May 1991 respectively, an overwhelming majority voted in favour of independence;[25] and, on the other hand, it led the

[19] Decision of 10 December 2010, Annex, facts nos 48-50; Yves Tomić, Hearing of 30 January 2008, T(E) 2986; Djuro Matovina, Hearing of 13 May 2008, T(E) 6748; VS-1013, Hearing of 25 March 2008, T(E) 5184-5185; P164, pp. 64-66; P1137, pp. 12905-12906, 12996-13011.
[20] Decision of 10 December 2007, Annex, facts nos 48-49; P261, part II, p. 73.
[21] Decision of 10 December 2007, Annex, facts nos 26-27; P164, pp. 64-65.
[22] Decision of 10 December 2007, Annex, fact no. 27; VS-007, T(E) 6110 (closed session); P377.
[23] The central figures in the parallel structure of the SAO Krajina were the Chief of the State Security of Serbia, Jovica Stanišić, and his assistant, Franko Simatović. This parallel structure was opposed to the attempts to negotiate a peaceful solution initiated by the presidents of some Croatian municipalities and by Croatia's Interior Minister Jovo Vitas, while a man close to Milan Martić and to Dušan Orlović threatened one of the negotiators with physical liquidation. *See* P1137, pp. 12920, 12934-12936.
[24] Judgement, paras 38, 43-46, 49-50.
[25] Decision of 10 December 2007, Annex, facts nos 56, 58; Yves Tomić, T(E) 2986.

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Serbs of Croatia and BiH, supported by Serbia, to seek the independence of "their" Autonomous Regions with a view to their annexation to Serbia.[26]

V. THE CRIMES

32. I wish first and foremost to express my profound disagreement with the extremely perfunctory way in which the majority of the Chamber made its analysis of the crime base evidence.

A. Crimes against humanity

1. Existence of an armed conflict as a pre-condition for the Chamber's jurisdiction over crimes against humanity

33. The Chamber unanimously found that an armed conflict existed in Croatia and in BiH throughout the entire period covered by the Indictment. However, the majority of the Chamber limited itself to a cursory finding that there was no armed conflict in Vojvodina due to the absence of an "indisputable" nexus between the armed conflicts in Croatia and in BiH, on the one hand, and the situation in Vojvodina, on the other.

34. I am nonetheless satisfied that such a nexus did indeed exist, primarily with the armed conflict in Croatia. I must also note that there was no ongoing combat on the territory of the SFRY, where Serbia, which included Vojvodina, was an autonomous Republic. Nevertheless, according to the case-law of the Tribunal, a nexus with the conduct of hostilities is required only for war crimes, not for crimes against humanity.

35. Yet, the SFRY was a warring party in an internal armed conflict until 27 April 1992,[27] the date of the official acknowledgement at the federal level of the independence of Croatia and BiH, and consequently the date of proclamation of the FRY consisting of Serbia and Montenegro.[28] As of that moment, and regardless of the remaining JNA presence on Croatian and Bosnian soil,[29] there existed an international armed conflict both between the FRY and Croatia, and between the FRY

[26] *See* P896; P897; P1137, pp. 12903-12911; P1139, pp. 1-3. As regards Bosnia, *see* the Judgement, paras 43-44, 46.
[27] *See* in particular Decision of 10 December 2007, Annex, fact no. 167; Emil Čakalić, T(E) 4910; Reynaud Theunens, T(E) 3967, 3974 and 3975; VS-004, T(E) 3402, 3403 and 3405-3408; VS-1064, T(E) 8694; P31, T. 43325-43326, 43659-43660, 43690-43691; P244; P245; P 278, para. 7; P632 pp. 33-35; P857, para. 11; P859, pp. 29807-29808; P864; P953, p. 1; P956; P992, pp. 46 to 49.
[28] *See* in particular P31, pp. 43659-43660.
[29] The JNA officially withdrew from Croatia in May 1992 and from Bosnia-Herzegovina on 19 and 20 May 1992. *See* in particular the Decision of 23 July 2010, Annex, fact no. 72; Decision of 10 December 2007, Annex, fact no. 185; Sulejman Tihić, T(E) 12685; P1074, p. 40.

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and BiH. All the federated Republics of the SFRY and, as of 27 April 1992, all the federated Republics - Serbia and Montenegro – of the FRY, were thus involved in armed conflicts.[30]

36. At the beginning of 1991, Serbia, in particular, waged a "personal" war against an independent Croatia within the administrative borders of the federal state of the SFRY, and in order to defend Serbian interests in that state – rather than to defend the territorial integrity of the SFRY.[31] Serbia waged that war primarily through its regular and special police forces,[32] and its TO, as well as by exercising control over the JNA.[33] In addition, the Croatian combatants who had laid down their arms and Croatian civilians, women and children included, were transferred from Croatia or from BiH and locked up in detention centres in Serbia, such as the one in Sremska Mitrovica for example, where they were subjected to torture and mistreatment.[34] Also relevant to the issue of the existence of an armed conflict including Serbia, and on the territory of Serbia, of which Vojvodina was a part, is the fact that the volunteers were recruited mainly in Belgrade and from among the Serbs of Serbia, as is the fact that the recruitment of volunteers was envisaged by law only in the event of a state of war, an imminent threat of war or in other emergency situations.[35] Furthermore, the Statute vests the Tribunal with jurisdiction over crimes committed since 1991 throughout the territory of the former Yugoslavia, on the premise that this entire area was involved in an international or internal armed conflict.

37. Accordingly, the majority of the Chamber was in possession of ample evidence that, had it been considered, would have allowed it to find beyond a reasonable doubt that an armed conflict

[30] In the spring of 1992, the region of Western Srem – Vojvodina being Eastern Srem – was still involved in an internal armed conflict in Croatia which was intertwined with Croatia's international armed conflict with the FRY, and Šešelj advocated the unity of the entire Srem area as territory of the Serbs. *See* notably P548, p. 2.
[31] Serbia's defence of Serbian interests in Croatia had even led the Serbs living in Croatia to opt for the annexation to Serbia of the Croatian territories with a Serbian majority; it was thus that on 1 April 1991, the Executive Council of SAO Krajina passed a resolution allowing for its annexation to the Republic of Serbia. *See* Reynaud Theunens, T(E) 3959. Also, around 17 August 1990, the Serbs of Croatia armed themselves with the help of the Knin police force and with logistical support from the Serbs of Bosnia. *See* P1137, pp. 12911-12912, 12929.
[32] The forces of the Serbian MUP were integrated with the armed forces of the SFRY and the FRY. *See* in particular the Decision of 23 July 2010, Annex, facts nos 109 and 110. The special forces, the Red Berets, were placed under the command of Franko Simatović. *See* the Judgement, para. 129.
[33] Between 9 May 1991 and 25 December 1991, 27 meetings were held between Boris Jović, General Veljko Kadijević, Slobodan Milošević and sometimes Blagoje Adžić, Chief of the General Staff of the SFRY's armed forces, during which Borisav Jović and Slobodan Milošević issued instructions to General Kadijević on the use of the armed forces of the SFRY. According to the Prosecution Expert Witness Reynaud Theunens, General Kadijević, Federal Secretary for National Defence, did not recognise Stjepan Mesić as his "Supreme Commander". *See* Reynaud Theunens, T(E) 3690, 3694, 3969 and 3980; P196, p. 20; P197; P198; P247, pp. 123-124.
[34] *See* Sulejman Tihić, T(E) 12577-12588; VS-051, T(E) 7538, 7540-7542, 7547-7550, 7626 and 7631 (closed session); P183, pp. 11-12; P278, paras 78-79; P587, para. 98 (under seal); P844, p. 3434 (under seal); P859, pp. 29882-29883; P868, p. 11826 (under seal); P1056, para. 80 (under seal).
[35] P193, pp. 74-75. *See* also Reynaud Theunens, T(E) 3651 and 3716, 3945-3946 referring to P261, part I, p. 79; VS-008, T(E) 13287, 13349, 13414, 13453 and 13455 (closed session); P843, para. 10. In 1990, before the beginning of the war, the Accused told a witness that he foresaw the onset of war and that camps in Serbia (in Western Bačka) had already been set up for the training of Chetnik volunteers. *See* P1129, p. 21585 (under seal). *See* also P1053, para. 29 (under seal).

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also existed on the entire territory of the FRY, and particularly, in that of Serbia including Vojvodina.

2. Existence of a widespread or systematic attack against the civilian population

38. The majority of the Chamber found that the Prosecution did not prove beyond any reasonable doubt that a widespread or systematic attack had been directed against the Croatian and Muslim civilian population of Croatia and BiH. Specifically, it deemed that the evidence submitted to the Chamber "points rather to an armed conflict between enemy military forces, with some civilian components."[36]

39. I strenuously contest this finding. In my opinion, no trier of fact could reasonably find, in the light of the evidence admitted to the record, that there was no widespread or systematic attack against the Croatian and Muslim civilian population of Croatia and BiH, during the period covered by the Indictment. In point of fact, in the municipalities of Vukovar, Zvornik and the Sarajevo area, and in the municipalities of Mostar and Nevesinje, these civilian populations were victims of a campaign of persecution and violence conducted by the Serbian forces with the aim of forcing them to leave the territories in which they had lived for centuries. This campaign led to the commission of large-scale persecution[37] and murder;[38] torture and cruel and/or inhumane treatment,[39] sexual assaults,[40] and the establishment and perpetuation of inhumane living conditions;[41] non-Serb civilians were also expelled or forced to abandon their villages,[42] they were subjected to unlawful

[36] Para. 192 of the Judgement.
[37] As regards persecution, *see* the following footnotes relating to the alleged underlying acts in paragraph 17 of the Indictment.
[38] The Chamber unanimously found that a large number of murders were committed by the Serbian forces, including members of paramilitary units, some of whom were "Šešelj's men", against Croatian and Muslim civilians in the municipalities of Vukovar and Zvornik, in "Greater Sarajevo", and in the Mostar and Nevesinje municipalities. *See* the Judgement, para. 207 (a)-(b); para. 210 (a)-(g); para. 213 (a); para. 216 (a)-(b).
[39] The Chamber unanimously found that torture and cruel treatment were committed by the Serbian forces, including members of paramilitary units, some of whom were "Šešelj's men", against Croatian and Muslim detainees in the municipalities of Vukovar and Zvornik, "Greater Sarajevo", and in the Mostar and Nevesinje municipalities. *See* Judgement, para. 207 (a)-(b); para. 210 (h)-(m); para. 213 (b)-(c); para. 216 (c)-(d).
[40] The Chamber unanimously found that sexual assaults were committed by the Serbian forces, including members of paramilitary units, some of whom were " Šešelj's men", against Croatian and Muslim detainees in the municipalities of Vukovar and Zvornik. *See* Judgement, para. 207 (c); para. 210 (m). Furthermore, on the sexual assaults inflicted on Muslim detainees at the Ekonomija farm and in the Zijemlje Primary School by Arkan's Tigers and by Serbian forces including members of the White Eagles, *see* Fadil Kopić, T(E) 5886; VS-1013, T(E) 5351; VS-1015, T(E) 5417-5418; VS-1051, T(E) 8846-8851 (closed session); P362, p. 6; P487, p. 3, paras 15-16 (under seal); P854, p. 6 (under seal); P855, p. 5 (under seal); P880, p. 28 (under seal).
[41] The Chamber unanimously found that Serbian forces, including members of paramilitary units, some of whom were "Šešelj's men", had detained Croatian and Muslim civilians in inhumane living conditions in the municipalities of Zvornik, the municipalities of "Greater Sarajevo", and in the municipalities of Mostar and Nevesinje. *See* Judgement, para. 210 (i)-(l); para. 213 (b); para. 216 (c); para. 219 (e)-(g).
[42] *See* for example: Decision of 23 July 2010, Annex, facts nos 155, 157-158; Ibrahim Kujan, T(E) 9656-9657; VS-1055, T(E) 7819-7820; VS-1060, T(E) 8571, 8571-8576, 8591-8599, 8629; VS-1111, T(E) 7699, 7706-7707 (private session); P472; P518, p. 3; P524, pp. 6-7; P840, p. 2, para. 3; P967, p. 1; P880, p. 30 (under seal); P993; P999, p. 3; P1000, pp. 9-10; P1101 (under seal); P1102, p. 2 (under seal); P1164, p. 2 (under seal); P1230, p. 11; P1319, p. 7; P1398, pp. 1-3 (under seal); P1400, p. 1 (under seal). On the expulsion of non-Serb residents of the city of Vukovar and

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detention[43] and forced labour;[44] their homes, as well as other public and private property[45] and educational and religious institutions[46] in their villages were destroyed wantonly or in the course of

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the villages of Kozluk, Skočić, Svrake and Hrtkovci by Serbian forces, members of the Serbian TO of Zvornik, the police and paramilitary units including Arkan's Tigers, the Yellow Wasps and "Šešelj's men", the JNA, the units of Rajko Janković, Dragan Damjanović and of Vaske and Ostoja Sibinčić, on behalf of the SRS, *see* for example the Decision of 8 February 2010, Annex B, fact no. 4; Anna-Maria Radić, T(E) 11989-11993, 12019; Fadil Banjanović, T(E) 12444-12474, 12484-12485; Safet Sejdić, T(E) 8166-8179, 8189-8197, 8345; Franja Baričević, T(E) 10626, 10631-10633, 10649, 10677-10679; Aleksa Ejić, T(E) 10391-10392, 10406, 10408, 10516; Katica Paulić, T(E) 11894-18895, 11897-11901, 11909-11912, 11926-11927; Ewa Tabeau, T(E) 10831-10832, 10860-10862, 10867-10868, 10899, 10907-10908; VS-061, T(E) 9917, 9930 and 9932, 9944-9945, 9947, 9958-9966 (private session) and 10019; VS-067, T(E) 15404-15405, 15394-15396, 15421-15422, 15426, 15432, 15448, 15467-15468, 15474-15476, 15554-15555 (private session); VS-1134, T(E) 10777-10787, 10793; P164, p. 89; P550, pp. 2 and 3; P551 (under seal); P555, pp. 1-2; P556, pp. 1-2; P557, pp. 1-2; P559, p. 1; P564 (under seal), pp. 3-5; P565; P1049, para. 19 (under seal); P1050, paras 3-4, 8, 10, 19-20 (under seal); P1330, para. 5; P463; P664; P665; P666; P668; P1347, pp. 4-5.

[43] On the unlawful detention at the Ovčara farm, in the Velepromet warehouse, the Standard shoe factory, the Ekonomija farm, the Ciglana factory, the Drinjača Dom Kulture, the Karakaj Technical School, Gero's slaughterhouse, the Čelopek Dom Kulture, Planja's house, the Iskra warehouse in Podlugovi, the barracks in Semizovac, the lockers of the football stadium at Vrapčići, the buildings in the city mortuary in Sutina, the Kilavci heating factory, in the Zijemlje Primary School and in the SUP building in Nevesinje, *see* for example the Decision of 23 July 2010, Annex, facts nos 149-150, 152-153, 188-189; Fahrudin Bilić, T(E) 8985-8992, 8996-9000 (private session), 9027, 9029; Vesna Bosanac, T(E) 11364, 11369-11370, 11405-11406; Emil Čakalić, T(E) 4911; Redžep Karišik, T(E) 8771-8773, 8776-8777; Vilim Karlović, T(E) 4668-4669, 4730-4731; Fadil Kopić, T(E) 5881, 5888-5890, 5906, 5915; Safet Sejdić, T(E) 8166-8167, 8170-8173, 8190, 8209, 8408-8410; Goran Stoparić, T(E) 2343-2344; Ljubiša Vukašinović, T(E) 12318; VS-016, T(E) 11130 (closed session); VS-021, T(E) 4645-4646, 4649-4650; VS-051, T(E) 7522-7524 (closed session); VS-065, T(E) 13064-13066 (closed session); VS-1012, T(E) 8436, 8444-8455 (closed session); VS-1013, T(E) 5197-5198, 5225-5226, 5245 (private session), 5198-5203 (including private session), 5205-5207, 5227, 5380-5381; VS-1015, T(E) 5398-5401, 5406, 5418-5420 (closed session), 5406, 5412-5413, 5454-5457; VS-1022, T(E) 9534-9535 (closed session); VS-1051, T(E) 8845-8846, 8851-8854 (closed session); VS-1052, T(E) 8925-8926; VS-1055, T(E) 7823, 7834, 7835, 7837-7844; VS-1064, T(E) 8698-8705, 8709, 8727; VS-1065, T(E) 6298-6302, 6309-6312; VS-1066, T(E) 13829, 13836, 13841-13842, 13849, 13856-13860, 13862, 13875, 13886-13889 (closed session); VS-1067, T(E) 15287-15289, 15291-15293, 15302, 15322-15323; VS-1068, T(E) 12266, 12274, 12277-12278 (private session), 15291-15293; P658, p. 5 (under seal); VS-1105, T(E) 9501; P82; P268, paras 10, 18-19, 47-48 (under seal); P278, paras 4, 64, 67; P302 (under seal); P303 (under seal); P304; P305 (under seal); P306 (under seal); P359; P360; P362, pp. 2-5, 7-8; P382; P383, pp. 6314, 6337, 6339; P457; P464; P475; P476 (under seal); P483, pp. 2 -3, paras 7-12 (under seal); P487, p. 2, paras 5-9, 20-24, 27-28, 31 (under seal); P521, p. 2 (under seal); P523, pp. 1-6 (under seal); P528, para. 44; P599; P604, para. 24; P602; P603, paras 99, 124; P630; P658, pp. 5, 7 (under seal); P659, paras 23, 27-28 (under seal); P824; P825 (under seal); P844, pp. 13-14, 16-19, 21-22, 24-25 (under seal); P849 (under seal); P854, p. 10; P880, pp. 21-22, 38 (under seal); P975, pp. 1-8, 10, 13; P1051, para. 10 (under seal); P1052, pp. 6-7 (under seal); P1074, p. 35 referring to P60; P1077, paras 98, 114, 116; P1085, paras 126, 131-132 (under seal); P1144, para. 80 (under seal); P1148 (under seal); P1156, p. 1 (under seal).

[44] On the forced labour at the Ciglana factory, Planja's house and in the Zalik shelters, *see* for example Judgement, para. 213 (c); Fahrudin Bilić, T(E) 8968-8969 (private session), 9020-9023; Redžep Karišik, T(E) 8769; VS-1013, T(E) 5241-5246; VS-1068, T(E) 12266; P 307; P362, pp. 7-8; P658, p. 4 (under seal); P659, para. 17 (under seal).

[45] On the deliberate destruction of homes during the attacks on the city of Vukovar and the villages of Lješevo, Donja Bijenja, Gornja Bijenja, Postoljani, Presjeka, Kljuna, Borovčići, Krusevljani, Pridvorci and Hrušta and the hamlet of Topla, *see* the Decision of 8 February 2010, Annex A, facts nos 11, 39-40, 44, 46, 49, 56, 59-61, 100, 102-103, 108-109, 113, 185, 202; Dragutin Berghofer, T(E) 4867; Vesna Bosanac, T(E) 11344-11347, 11339-11344, 11395-11397; Emil Čakalić, T(E) 4910-4912, 4954, 4956; Goran Stoparić, T(E) 2327; VS-002, T(E) 6459-6461, 6532; VS-051, T(E) 7523 (closed session); P29; P55, p. 6; P91, p. 2; P183, p. 16; P195, pp. 3-5; P261, p. 231; P268, paras 5-10, 15, 1516 (under seal); P275; P278, paras 2, 4, 7-9, 13; P291; P407, pp. 5-6; P526, para. 25; P527, para. 16; P528, paras 22 and 38; P591; P593; P594; P595; P603, paras 9-10, 11-12, 16-18, 20, 35, 39, 42, 52; P844, pp. 6-8, 10, 53-54 (under seal); P845, pp. 1-2; P921, p. 1; P1001, pp. 11-12; P1076, p. 22, referring to P57; P1161, p. 2 (under seal); P1260, p. 121; P1291, p. 3; P1373 (under seal); P1374 (under seal); P1376 (under seal); P1377 (under seal). *See* VS-1055, T(E) 7820-7822, 7834-7835, 7849-7850, 7906, 7903-7907; VS-1111, 3 June 2008, T(E) 7709, 7711-7713, 7716-7717, 7720-7721, 7724, 7735-7738 (private session); P449 (under seal); P451, pp. 2-3 (under seal); P840, paras 13, 15. *See* VS-1067, T(E) 15315-15316; P891, p. 2; P1044, para. 44; P1051, paras 8-9 (under seal). *See* Decision of 23 July 2010, Annex, fact no. 181; Vojislav Dabić, T(E) 15157-15158; Ibrahim Kujan, T(E) 9656-9657; VS-1022, T(E) 9525, 9528-9531 (closed session); P483, para. 9 (under seal); P524, pp. 6-7; P880, pp. 23, 28-30 (under seal); P881, p. 7, para. 24 (under seal).

[46] On the destruction of mosques in Zvornik municipality and in the territory of Nevesinje municipality, *see* the "Decision on Expert Status of András Riedlmayer", public, 8 May 2008, p. 3; András Riedlmayer, T(E) 7318-7320,

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disproportionate military attacks; non-Serb civilians were also subjected to restrictive and discriminatory measures.[47]

40. The non-Serb civilian population was therefore also the victim of violations of the laws or customs of war.[48] In particular, the wanton destruction of villages and the destruction or deliberate damage to institutions dedicated to religion appear to be especially relevant for assessing the widespread nature of the attack.[49]

41. From my point of view, the evidence admitted to the record also establishes beyond any reasonable doubt that persecution and acts of violence of all types were coordinated, following an identical pattern during or after the takeover of municipalities, as well as in the detention centres.[50] Bearing in mind moreover the places and dates of the incidents and the identities of the victims - which are consistent with a widespread and systematic attack - as well as the scale and nature of the attack directed against the Croatian and Muslim civilian populations of Croatia and BiH, the direct and circumstantial evidence also shows that the crimes examined above were part of an attack and that the perpetrators of these acts were aware of this attack and of the fact that the crimes were part of that attack.[51]

42. As regards the issue of the widespread or systematic attack in Vojvodina, the majority of the Chamber only considered the crimes alleged in Hrtkovci from 6 May 1992, whereas the alleged crimes were committed within the already prevailing context of a widespread and systematic attack. This rather complex issue should have been thoroughly analysed, which the majority failed to do.

43. First of all, the evidence shows that the widespread and systematic attack against the civilian population in Croatia had direct repercussions in Vojvodina.[52] Furthermore, it is clear from the evidence admitted during the trial that there was a widespread attack against the non-Serb civilian population in Serbia itself.[53] Finally, the evidence shows that there was a specific, systematic attack against the non-Serb civilian population in Vojvodina, particularly in Hrtkovci and the

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7344, 7352; Ibrahim Kujan, T(E) 9647; VS-1067, T(E) 15335-15337; VS-037, T(E) 14855, 15015-15016; VS-038, T(E) 10124-10125, 10151-10152, 10162-10163, 10165-10168 (private session); P444; P1044, para. 31; P1045, pp. 177-313 and paras 29, 31; P1144, para. 113 (under seal), corroborated by P1401, pp. 132-134 (under seal); P524, p. 2; P880, p. 30 (under seal); P1045, pp. 138-139, 141-146, 150-152, 156-175; P1052, p. 3 (under seal).

[47] *See* for example: Decision of 23 July 2010, Annex, fact no. 155; VS-1055, T(E) 7803, 7814-7819, 7823-7826 (private session); VS-1111, T(E) 7694-7698; P456 (under seal); P840, p. 2, para. 2; P967, p. 1; P993; P1164, p. 2 (under seal); P1398, pp. 1-3 (under seal); P1400, p. 1 (under seal).

[48] *See* Judgement, para. 207; para. 210; para. 213; para. 216; paras 219-220.

[49] It was therefore very useful for the majority to exclude them, by virtue of a groundless justification, from the finding they made on the presence of certain war crimes.

[50] *See supra* the cited evidence.

[51] *See supra* the cited evidence.

[52] *See* for example, P183, pp. 6-7; P268, paras 61-66 (under seal); P528, paras 30-32, 47.

[53] *See* for example C26, pp. 5, 13 (under seal); P551, pp. 1-2. On the distribution of automatic weapons to Serbian civilians in certain parts of Vojvodina from 1991 on, *see* C26, p. 14 (under seal); C27, pp. 1-2 (under seal).

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neighbouring villages, insofar as the departure of Serbian refugees from Croatia and their arrival in Vojvodina were organised and encouraged with the aim of destabilising the region and cleansing it from non-Serbs.[54]

44. A trier of fact who had considered the totality of the evidence admitted to the record, and not only a part thereof, could not have reasonably found that no widespread or systematic attack existed against the civilian population, not even with regard to Vojvodina.

B. Violation of the laws or customs of war

45. Having excluded the existence of a widespread or systematic attack as a contextual element of crimes against humanity alleged to have been committed in Croatia, BiH and Serbia (Vojvodina), the majority considered only certain violations of the laws or customs of war. That is, incidentally, the most consistent thing it did, in view of its premise that everything that had happened to the civilian population in the former Yugoslavia from 1991 to 1993 could fall into the category of "certain excesses" of the armed conflict then under way.

46. As regards the violations of the laws or customs of war, some of my disagreements focus on the crimes which, in the opinion of the majority of the Chamber, were insufficiently supported by the evidence, in particular: (i) the murder by beheading of a Muslim in Crna Rijeka and the execution of detainees in the Crna Rijeka sector (Greater Sarajevo) by members of Vaske's unit in the summer of 1993;[55] and (ii) torture and cruel treatment in Gero's slaughterhouse (Zvornik municipality) between April and July 1992;[56] in my opinion, the majority should have found that these crimes had been established by the evidence admitted to the record. My deeper disagreements concern the crimes of wanton destruction of villages or devastation not justified by military necessity, as well as destruction or wilful damage to institutions dedicated to religion or education,

[54] On the context of the attack prior to 6 May 1992 which took the form of a campaign of threats, intimidation and violence launched by Ostoja Sibinčić on behalf of the SRS against the non-Serb residents of Hrtkovci, particularly against Croats, for the purpose of forcing them to leave their homes and the village of Hrtkovci. *See* Aleksa Ejić, T(E) 10328, 10469, 10510; Katica Paulić, T(E) 11900-11901; VS-061, T(E) 9896, 9906-9909, 9911-9912, 9917 (private session); VS-067, T(E) 15396 (private session), 15432; C26, p. 13 (under seal); C27, p. 1 (under seal); P551, pp. 1-2 (under seal). On the organised nature of the Serbian refugees' departure from Croatia and their arrival in Vojvodina, *see* Franja Baričević, T(E) 10599-10600, 10603-10604, 10666-10667, 10669 and 10674, 10755 and 10757; Aleksa Ejić, T(E) 10515-10516; Katica Paulić, T(E) 11896-11899; VS-067, T(E) 15421-15422 (private session), 15425; VS-1134, T(E) 10793; P564, p. 3 (under seal); P1049, p. 4 (under seal); P1050, pp. 9-10 (under seal); P1056, paras 87-88 (under seal); P1058, paras 101-102 (under seal).

[55] *See* Judgement, para. 203 (a). *Contra* Safet Sejdić, T(E) 8214-8215, 8228, 8316, 8350-8351; P840, pp. 3 and 5, paras 5, 16-17. With regard to the decapitation of a Muslim man in Crna Rijeka, the evidence establishing this alleged crime does not allow for it to be dated to the summer of 1993, but to the end of 1993 or the beginning of 1994. In my view, this erroneous date is not decisive.

[56] *See* Judgement, para. 203 (e). *Contra* VS-1066, T(E) 13856-13857, 13862 (closed session).

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all of which have been rejected by the majority of the Chamber on different grounds, specifically for having confused a military attack that did not discriminate between military and civilian targets, with a military attack that was aimed at military targets, but was disproportionate.[57]

VI. THE CRIMINAL RESPONSIBILITY OF THE ACCUSED

A. Physical commission

47. Having ruled out the existence of a widespread or systematic attack as a contextual element of crimes against humanity, the majority did not address the allegations regarding the crime of persecution that, according to the Prosecution, was committed through the following underlying acts and on which we admitted a great deal of uncontroversial evidence: expulsion or forcible transfer; murder; unlawful imprisonment or detention; the establishment and perpetuation of inhumane living conditions; torture and abuse; forced labour; theft; sexual assaults; the imposition of restrictive and discriminatory measures; wanton destruction of homes and other public and private property, and wilful destruction of institutions dedicated to religion or education. For these underlying acts of the crime of persecution, responsibility is alleged for commission by participation in a JCE or by instigation and aiding and abetting as accessory forms, while for the crime of persecution through the underlying act of denigration of the Croatian and Muslim population, the responsibility of the Accused is also alleged for physical commission through his speeches.[58]

48. I note that the Prosecutor was somewhat vague in relation to the last allegation: in the Indictment he alleged physical commission for three speeches – Vukovar, Mali Zvornik and Hrtkovci – while explicitly forgoing to plead physical commission for the speech in Mali Zvornik in his Closing Brief. This speech was included under instigation and, moreover, its gist, which was particularly denigratory in respect of the Muslim community of the former Yugoslavia, has been proven beyond any reasonable doubt. Furthermore, in paragraph 15, the Prosecution only refers to non-Serb civilian populations as victims, even though further on, in Article 17 (k), he alleges

[57] *See* Judgement, para. 204 (a)-(b). On the evidence demonstrating wanton destruction of villages or devastation not justified by military necessity, and wilful destruction or damage to institutions dedicated to religion or education, *see supra*.

[58] In the Indictment, the Accused is also charged with physical commission for calling for expulsions and forcible transfer. In this allegation, the Prosecution has in mind the broader concept of physical commission that was applied by the Appeals Chamber to acts of genocide in certain ICTR cases. I would not have applied this notion to the alleged appeals, the responsibility for which in our case is better represented by the accessory form of aiding and abetting.

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denigration of these same populations, but in general, without specifying "civilians".[59] These allegations are not clear. Moreover, there is a reasonable doubt as to whether Šešelj, when referring to "Ustashas" in his speeches of 12-13 November 1991 in Vukovar and of 7 November 1991 on the road to Vukovar, had meant only the Croatian combatants who had an ideological affiliation to the Croatian combatants in the Second World War and were in favour of Vukovar belonging to Croatia.[60] I therefore believe that these speeches cannot be considered as a form of persecution against the civilian populations.[61]

49. Nonetheless, it is my opinion that the allegation of the physical commission by Šešelj of the denigration of the non-Serb populations, particularly Croats, as an underlying act of persecution remains valid where the Hrtkovci speech is concerned. I wish to further elaborate on this aspect, above all so as to demonstrate that the majority, by excluding a widespread or systematic attack as a contextual element of crimes against humanity, knowingly refrained from taking a position on a very sensitive issue, especially in the world we live in today, and which goes to the heart of the Prosecution's allegations in this case: the issue of criminal responsibility for speech known as hate speech.

1. Discriminatory denigration of a group or its members by discourse and limits to freedom of expression

50. The issue of the denigration of a group or a member of that group in speeches, sometimes commonly referred to as "hate speech",[62] is intimately related to the problematic issue of possible limits to the right of freedom of expression. In particular, this gives rise to the question of the balance between two different fundamental rights: the right to freedom of expression and the right or rights that would be violated by way of the discriminatory denigration of a group or its members.

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[59] Let me quote, regarding the distinction between "civilian population" and "population" in the Geneva Conventions, my commentary "Humanitarian Assistance", from *The 1949 Geneva Conventions: A Commentary*, Oxford, 2015, p. 248 and *et seq*.

[60] I am quite convinced of this interpretation, but I admit that the Accused could reasonably have understood that he had to defend himself regarding a speech implying just Croatian combatants. The Indictment and the Pre-Trial Brief should have been more specific on this point.

[61] Moreover, this does not exclude qualifying them as appeals to show no mercy to Croatian combatants and therefore as incitement to murder as a war crime pursuant to Common Article 3 of the Geneva Conventions. However, given that the Prosecution, in para. 18 of the Indictment, alleges murder only against the Croatian and Muslim civilian population, and not against combatants, the majority erred also in this analysis made in para. 318 of the Judgement. This is confirmation of the superficiality with which the majority interpreted the Prosecution's allegations.

[62] In the European framework, Recommendation 97(20) of the Committee of Ministers of the Council of Europe stipulates that "the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin" (Recommendation 97(20) of the Committee of Ministers of the Council of Europe, 30 October 1997, Principle 1).

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(a) Jurisprudence of international criminal law

51. With regard to "hate speech" as persecution, it is stated that "It is not a provocation to cause harm. It is itself the harm."[63] Accordingly, "there need not be a call to action in communications that constitute persecution", as "there need be no link between persecution and acts of violence."[64]

52. Denigration by speech must in fact be distinguished from instigation of the crimes under the Statute as an accessory form of responsibility for instigation to persecution, which the Judgement addresses in paragraph 333, with the majority finding the Accused not guilty.[65]

53. International criminal tribunals have found a number of accused guilty of persecution by denigration through speech. The Nuremberg Tribunal thus convicted Julius Streicher for persecution by virtue of his anti-Semitic writings, qualified as "the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialists' policy of Jewish persecution and extermination."[66] Before the ICTR, Georges Ruggiu pleaded guilty to and was convicted for acts of persecution through his radio broadcasts aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds.[67] In the *Nahimana* case, known as the "Media case", the Trial Chamber found the three Accused guilty of the crime of persecution for advocating ethnic hatred, specifically by virtue of the content of radio broadcasts or press articles.[68] Some of these convictions have been upheld on appeal by a majority.[69] Conversely, in the *Bikindi* case, at issue was aiding and abetting persecution through the songs of the Accused. The Trial Chamber deemed that Bikindi's songs effectively encouraged ethnic hatred, but it excluded, on the evidence, any role of the Accused himself in the dissemination of these songs on the radio, and therefore acquitted him on this Count.[70] Nevertheless, that Chamber also considered the issue of the gravity of "hate" speech *per se* and found that "depending on the message conveyed and the context, the Chamber does not exclude the possibility that songs may constitute persecution as a crime against humanity".[71]

[63] *Nahimana et al.* Judgement, para. 1073.
[64] *Nahimana et al.* Judgement, para. 1073.
[65] Denigration by speech as physical commission of a crime is also to be distinguished from the crime of "direct and public incitement to commit genocide", as stipulated in Article 4 (3) (c) of the ICTY Statute and Article 2 (3) (c) of the ICTR Statute as a crime in itself.
[66] *See* the text of the Judgement available on: http://avalon.law.yale.edu/imt/judstrei.asp .
[67] *Ruggiu* Judgement, paras 22 to 24.
[68] *Nahimana et al.* Judgement, paras 1069-1082 and, more specifically, paras 1080-1082.
[69] *Nahimana et al.* Appeal Judgement, paras 989-1016.
[70] *Bikindi* Judgement, paras 433-440. He was nevertheless convicted for direct and public incitement to genocide for personally disseminating his songs of hatred through a public address system.
[71] *Bikindi* Judgement para. 395.

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(b) International human rights law

54. Instruments for the protection of human rights, both international and regional, enshrine the fundamental right to freedom of expression but admit that this right has its limits. An overview of the relevant international provisions and decisions can be found in the *Bikindi* Judgement to which I refer.[72]

55. *Ad abundantiam, de lege ferenda,* I note General recommendation No. 35 of the Committee on the Elimination of Racial Discrimination that details the factors that must be taken into account if a certain form of conduct is to be given the qualification of discrimination and incitement as offences punishable by law, namely: the content and form of speech; the economic, social and political climate; the position and status of the speaker; the reach of the speech; the objectives of the speech.[73]

56. Let us take a look at the development of ECHR case-law on the subject of "hate speech" based on Article 10 of the Convention, which enshrines the right to freedom of expression, while providing for certain limitations. In the view of the ECHR, an individual's freedom of expression may be restricted in two ways in the case of denigrating speech or hate speech. The first pertains to prohibition of abuse of rights, provided for under Article 17 of the Convention, that may be invoked when the speech is such that it negates the fundamental values of the Convention.[74] The second pertains to restrictions on freedom of expression as provided for under paragraph 2 of Article 10, when the gravity of the denigrating or "hate" speech is such that it amounts to the destruction of the fundamental values of the Convention.[75]

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[72] *Bikindi* Judgement para. 380. The Judgment also mentions the relevant case-law allowing for limitations to be imposed on freedom of expression (para. 380, and *see* also footnote 857 regarding the case-law of the adjudicating bodies of the aforementioned international instruments).

[73] General Recommendation No. 35 of the Committee on the Elimination of Racial Discrimination, 26 September 2013, CERD/C/GC/35, para. 15.

[74] In this case, the author of the speech, having abused his right to freedom of expression by performing an act aimed at the destruction of rights and liberties, cannot invoke the protection accorded by the Convention: ECHR, Final Decision, 10 November 2015, *Dieudonné M'bala M'Bala v. France*, Application 25239/13; ECHR, Final Decision, 20 February 2007, *Pavel Ivanov v. Russia*; ECHR Commission, Decision. 11 October 1979, *Glimmerveen and Hagenbeek v. Netherlands*; ECHR, Final Decision, 16 November 2004, *Norwood v. United-Kingdom*

[75] In this case, the European Court is satisfied that interference by the state that restricts freedom of expression is provided for under the law, pursues one of the legitimate objectives enumerated in Article 10§2, and is "necessary in a democratic society". The European Court has, thus, often ruled on the issue of hate speech and found that the state had rightly limited the right to freedom of expression of the applicant. *See*, on the issue of incitement to discrimination or racial hatred: ECHR, *Soulas et al. v. France*, 10 July 2008; ECHR, *Féret v. Belgium*, 16 July 2009; ECHR, *Le Pen v. France*, 20 April 2010 (Decision on Admissibility); on incitement to ethnic hatred: ECHR, *Balsyté-Lideikiené v. Lithuania,* 4 November 2008; on advocacy of violence and incitement to hostility: ECHR, *Sürek* (no. 1) *v. Turkey*, 8 July 1999 (Grand Chamber); ECHR, *Gündüz v. Turkey*, 13 November 2003 (Decision on Admissibility); ECHR, *Dicle (no. 2) v. Turkey*, 11 April 2006. For examples of cases where the Court considered that the speeches could not be qualified as hate speeches, *see*: ECHR, *Jersild versus Denmark*, 23 September 1994; ECHR, *Gündüz v. Turkey,* 4 December 2003.

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57. The Appeal Judgment *Féret versus Belgium* is particularly relevant with regard to the facts of the case, for the ECHR entered a criminal conviction against a politician in Belgium. After having specifically addressed the issue of incitement to hatred, it outlined the following:

> "Violations of individual rights through insults, ridicule or defamation directed at certain parts of the population and specific groups related thereto, or incitement to discrimination, as in the present case, suffice to prompt the authorities to combat racist discourse in the face of the irresponsible exercise of the right to freedom of expression that violates human dignity, and even the right to security of these parts or groups of the population. Political speeches that advocate hatred based on religious, ethnic and cultural prejudices are a threat to social peace and political stability in democratic States".[76]

The Court examines, thereafter, the particular question of speeches made by members of parliament – such as the Accused in our case, for a certain period of time covered by the Indictment - and states the following: "Being a member of parliament cannot be considered as a circumstance capable of mitigating (his) responsibility". In that respect, it "recalls that it is of the utmost importance that politicians refrain from making statements that are likely to foster intolerance in their public speeches" (*Erbakan v. Turkey*, No 59405/00, 6 July 2006, para. 64), holding that "politicians should pay particular attention to the defence of democracy and its principles, for their ultimate goal is in effect to seize power".[77]

58. In light of what the majority considers in paragraphs 196-198 with regard to electoral propaganda speeches, it must be noted that the European Court attaches particular importance to "means of transmission, and the context in which the incriminating words were disseminated in this case, and consequently, on their potential impact on public order and social cohesion". In the *sub iudice* case, it concerned "political party tracts distributed during an election campaign" which according to the Court, constituted "a form of expression aimed at reaching a broad-based electorate, namely the overall population". It thus added: "If, in the context of an election, political parties should have broad freedom of expression to try and win over their electorate, in the event of a racist or xenophobic speech, such a context stokes the flames of hatred and intolerance, for the position of the running candidates becomes necessarily more entrenched, and stereotyped slogans or formulas tend to override reasonable arguments. The impact of a racist and xenophobic speech is therefore greater and more harmful".[78]

(c) Internal legislation and case-law

59. In correlation with international obligations imposed on State Parties according to the various international instruments on exceptional limits to freedom of expression, numerous internal

[76] ECHR, *Féret v. Belgium*, 16 July 2009, para. 73.
[77] *Ibid.*, para. 75.
[78] *Ibid.*, para. 76

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laws have prohibited denigration through speeches *per se*, or as a means of inciting hatred and/or violence.[79]

60. The *Nahimana* Judgement refers to laws that prohibit hate speeches in Germany, Vietnam, Russia, Finland, Ireland, Ukraine, Iceland, Monaco and Slovenia.[80] Other internal laws may also be cited. Article 145 (a) of the Criminal Code of BiH, Article 163 of the Criminal Code of the Federation of BiH, Article 390 of the Criminal Code of *Republika Srpska* and Article 160 of the Criminal Code of Brčko district prohibit denigrating speeches in the form of incitement to national, racial or religious hatred.[81] The Criminal Code of Serbia[82] and the Criminal Code of Croatia[83] also penalize this kind of speech. In France, words that constitute a form of public provocation to discrimination, hatred or national, racial or religious violence are punishable.[84] In Italy, propaganda advocating superiority or racial or ethnic hatred is prohibited, as is the commission of, or incitement to commit acts of violence on discriminatory grounds.[85] In the United Kingdom, expressions of racial hatred that target groups defined by to race, nationality, citizenship, or ethnic or national origin are prohibited, as are expressions of religious hatred.[86] The Canadian Criminal Code condemns every one who, by communicating statements, in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, but also every one who, by communicating statements, other than in private conversations, wilfully promotes hatred against any identifiable group.[87] In Australia, according to the federal *Racial Discrimination Act* of 1975, offensive, insulting, humiliating or intimidating behaviour on the grounds of race, ethnic or national origin is unlawful,[88] and certain federal laws prohibit more specifically incitement to racial hatred.[89] In South Africa, the *Promotion of Equality and Prevention of Unfair Discrimination Act 4* of 2000 prohibits denigrating speech based on race, ethnicity,

[79] These two aspects are examined together here, for in national legislation they are often not separated. I do not intend thereby to confuse the physical perpetration of the crime of persecution by discriminatory denigration of a community through speeches, with instigating the crime of persecution, or other statutory crimes alleged in this case, by using the same means, which is an issue addressed in paragraphs 282-350 of the Judgment of the majority and in paragraphs 50-75 and 93-125 of this opinion.

[80] *Nahimana et al.* Judgement para. 1075. The *Bikindi* Judgement refers to it: *Bikindi* Judgement, para. 380, footnote 858.

[81] Previously, Article 134 of the Criminal Code of the former Yugoslavia, in force in BiH until 2003, also prohibited such hate speech, inciting hatred or national, racial or religious hostility.

[82] Criminal Code of Serbia, Article 137; the Criminal Code of the former Yugoslavia mentioned in the previous footnote was in force in Serbia until 2006.

[83] Criminal Code of Croatia, Article 174(3); the Criminal Code of the former Yugoslavia mentioned in the previous footnote was in force in Croatia until 1997.

[84] Law on the Freedom of the Press of 29 July 1881 (amended by Law No. 72-546 of 1 July 1972 on combating racism), Articles 23, 24 al. 7 and 8, 29, al. 1 and 2, 32 and 33.

[85] Law No.°654 of 13 October 1975, Article 3, replaced and later amended by Laws No.°205 of 1993 "Legge Mancino" and No. 85 of 24 February 2006.

[86] "Public Order Act" of 1986 (amended by the "Racial and Religious Hatred Act" of 2006), Articles 17 and 18 and 29 (A).

[87] Canadian Criminal Code, Article 319.

[88] "Racial Discrimination Act 1975", Article 18 (C).

[89] "Anti-Discrimination Act of New South Wales", Article 20 (C).

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religion and culture.[90] Lastly, the United States of America, where freedom of expression is fully protected by the first Amendment to the Constitution, provide for certain restrictions on this right in the case of "hate" speech. Consequently, this type of speech may be limited or prohibited if it constitutes one of the following acts: "incitement of illegal activity",[91] "fighting words"[92] or "true threats of violence".[93]

2. Denigration of a particular community as actual discrimination

61. Several Chambers of the ICTR have already considered that denigrating speech targeting a specific population may constitute actual discrimination.

62. In the *Ruggiu* Judgement, the Trial Chamber held that acts of persecution – particularly when messages denigrating the Tutsis and the Belgians were read out by the Accused – were "aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds (…)" and that the deprivation of their rights "can be said to have as its aim (…)/as printed/

/as printed/ that destroys the dignity of those in the group under attack."[95] The Appeals Chamber considered that "hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, (…) constitutes "actual discrimination."[96]

3. Discriminatory denigration of a community as denial or violation of the fundamental right to dignity and the right to security

64. The Prosecution submits that the denigrating speeches made by the Accused violated the right to dignity and the right to security of the targeted populations.[97]

65. In the *Nahimana* and *Bikindi* cases, the Judges held that the denigrating speeches violated the fundamental right to respect for the dignity[98] and security[99] of the members of the targeted group. They specified that such speech "creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive them and treat them as less than

[90] "Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000", Article 10.
[91] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
[92] *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942); *see* also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).
[93] *Watts v. United States*, 394 U.S. 705, 708 (1969); *see* also *Virginia v. Black*, 538 U.S. 343, 360 (2003).
[95] *Nahimana et al.* Judgement, para. 1072.
[96] *Nahimana et al.* Appeal Judgement, para. 986.
[97] Prosecution's Closing Brief, para. 561.
[98] *Nahimana et al.* Appeal Judgement, para. 986; *Nahimana et al.* Judgement para. 1072; *Bikindi* Judgment para. 392. *See* also arguments in *Kvočka* Judgement and Appeal Judgement, respectively paras 190-191 and paras 323-325.
[99] *Nahimana et al.* Appeal Judgement, para. 986, footnote 2258.

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human. The denigration of persons on the basis of their ethnic identity or other group membership, in and of itself, as well as in its other consequences, can be an irreversible harm".[100]

66. The ECHR[101] and several domestic courts have ruled on the matter in a similar way.[102]

67. On the basis of the cited case-law and domestic legislation, we may infer that denigrating speech violates, at the very least, the right to respect for human dignity and the right to security.

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4. A level of gravity equal to the other crimes against humanity

68. As regards the gravity of the "hate" speech, which is a requisite element to qualify this conduct as an underlying act of persecution, the Trial Chamber in the *Nahimana* case considered it "evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution".[103]

69. In the same case, the Appeals Chamber Judges were of the view that it was not necessary "to decide here whether, in themselves, mere *hate speeches not inciting violence* against the members of a group are of a level of gravity equivalent to that for other crimes against humanity".[104] The Judges had evidence of "mere hate speeches" accompanied by speeches calling for violence and, therefore, the Appeals Chamber found in this case that: "*the hate speeches and calls for violence* against the Tutsis made after 6 April 1994 (...) *themselves* constituted underlying acts of persecution".[105] But it also emphasised that it "is not convinced by the argument that mere

[100] *Nahimana et al.* Judgement, para. 1072. *See* also *Nahimana et al.* Appeal Judgement, para. 986 and footnote 2256. In the *Ruggiu* Judgement, the Chamber held that the reading out on the radio of denigrating messages against the Tutsis and the Belgians had even violated the Tutsis' and Belgians' rights to life and freedom. But, conversely, the Appeals Chamber in the *Nahimana* case stated that it "is not satisfied that hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them".
[101] ECHR, *Féret v. Belgium*, 16 July 2009, Application No. 15615/07, para. 73.
[102] Supreme Court of Canada, *R v. Keegstra*, [1990] 3 RCS 697, pp. 754-755; *Canada (Human Rights Commission) v. Taylor* [1990] 3 SCR 892, p. 919; Australian Federal Court, *Eatock v. Bolt* [2011] FCA 1103 (28 September 2011), paras 212, 214; Constitutional Court of South Africa, *S v. Mamabolo* (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001), para. 41.
[103] *Nahimana et al.* Judgement para.1072.
[104] *Nahimana et al.* Appeal Judgement, para. 987 (no emphasis in the original); on this issue, *see* Judge Pocar's criticism in his partially dissenting opinion appended to the Appeal Judgement, para. 3.
[105] *Nahimana et al.* Appeal Judgement., para. 988 (no emphasis in the original); likewise, *see* Judge Fausto Pocar's partially dissenting opinion, para. 3.

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hate speech cannot constitute an underlying act of persecution because discourse of this kind is protected under international law."[106]

70. In the *Bikindi* Judgement, the Trial Chamber also considered the gravity of "hate" speech *per se* and held that "depending on the message conveyed and the context, the Chamber does not exclude the possibility that songs may constitute persecution as a crime against humanity".[107]

71. In light of this case-law, I am convinced that no reasonable trier of fact could have denied that the Hrtkovci speech - taken *separately* from the other underlying acts of persecution, but within the context of the grave conflict in which it was made - demonstrated a level of gravity equal to the other crimes against humanity.

72. The international and domestic provisions and related case-laws that I have examined above are also very relevant to the analysis of the evidence on the issue of the Accused's responsibility for instigating war crimes, the only crimes considered by the majority, but the majority did not take these provisions and case- law into account at all.

B. The joint criminal enterprise

1. Existence of the common purpose of the alleged JCE and plurality of participants

73. I cannot share in the conclusion of the majority of the Chamber that the Prosecution failed to prove the existence of a joint criminal enterprise ("JCE") in the present case in which the Accused, Vojislav Šešelj, and other members enumerated in paragraph 8 (a) of the Indictment, participated.

74. This disagreement essentially concerns the identification of the common criminal purpose alleged by the Prosecution. Not only do I not agree with the majority's method in reaching such an identification, but I also find that the majority erroneously identified the substance of the common purpose.

75. As regards the method used by the majority, I object to the fact that in order to identify the alleged common criminal purpose, it relied not only on the Indictment and the Pre-Trial Brief, but

[106] *Nahimana et al.* Appeal Judgement, footnote 2264. I understand that with regard to determining whether the gravity of the hate speeches accompanied by calls for violence in the *Nahimana* case are of a level of gravity equivalent to that of other crimes against humanity, the Appeals Chamber does not exclude the possibility of finding that "hate speech" may in itself be of such gravity that it constitutes in itself an act of persecution. All depends on the content and the context of the speech. This is implicitly confirmed by the same Chamber in its findings mentioned in para. 67.
[107] *Bikindi* Judgement para. 395.

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also on the Prosecution's arguments in its Closing Brief. By proceeding in this manner, the majority ends up obfuscating the Prosecution's allegations, rather than clarifying them - if any such clarification were necessary. This approach knowingly sets aside the well-known decision issued by Trial Chamber II ("Chamber II"), entitled "Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment", filed on 3 June 2004, that had already ruled on the matter.[108] In paragraph 55 of the said Decision, Chamber II merely cites paragraph 6 of the Indictment, in that it clearly specifies the purpose of the alleged joint criminal enterprise, which was "the permanent forcible removal, through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal, of a majority of the Croat, Muslim and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia, and large parts of Bosnia and Herzegovina, and from parts of Vojvodina, in the Republic of Serbia, in order to make these areas part of a new Serb-dominated state". This, therefore, had to do with forcing the majority of non-Serbs to permanently leave territories they had inhabited for centuries through the commission of crimes with which the Prosecution charges Vojislav Šešelj: persecution, murder, torture and cruel treatment, deportation and forcible transfer, wanton destruction and plunder of public and private property.

76. As regards the substance of the common criminal purpose, the majority, at the very start of its reasoning, cites this same paragraph 6 of the Indictment. However, in its ensuing analysis, the majority accepts that the establishment "of a new Serb-dominated state" constitutes the alleged common criminal purpose.[109] It then holds that this "expression could be taken to mean the plan for a Greater Serbia supported by the Accused".[110]

77. By thus misrepresenting the alleged common criminal purpose, the majority is able to determine that, ultimately, the Prosecution's submission is that the purpose is exclusively political, not criminal. The problem is that this political purpose is not alleged by the Prosecution, neither in the Indictment nor in the Pre-Trial Brief, as the common purpose of the JCE.[111]The fact that the Prosecution, after having clearly set out the common criminal purpose as the forcible removal, through the commission of crimes, of non-Serbs from these territories, then submits that the creation of a state unifying all Serbs, and cleansed of all non-Serbs, is the ultimate political purpose to be achieved, does not obscure the allegation of a criminal purpose. In fact, this political purpose

[108] Since a Chamber is entitled to review its past decisons, the majority should have justified its reconsideration.
[109] Judgement, para. 227. *See* also para. 223.
[110] Judgement, para. 227.
[111] I must emphasise that if the Prosecution had indeed alleged that the common purpose of the JCE was the creation of "Greater Serbia", I would have shared the conclusions of the majority according to which this was only a political objective specific to the Accused, essentially meaningful in historical terms, and shared by the other leaders, members of the said JCE, whose common aim, furthermore, was the creation of a unified Serbian state, cleansed of non-Serbs. I

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is both the ideological reason behind the "forcible removal, through the commission of crimes, of non-Serbs from these territories" and the natural and political consequence of the criminal purpose and of the crimes inherent to its furtherance, particularly deportation and forcible transfer.

78. The majority's confused understanding of the Prosecution's written submissions led it to draw clearly unreasonable conclusions as to the existence of a common purpose and the plurality of persons and groups sharing the criminal intent. I note, moreover, that the majority undertook to examine the evidence, as a purely superfluous exercise,[112] notwithstanding its findings on the alleged non-existence of a common criminal purpose.

79. Had the Prosecution alleged a political purpose, the majority's conclusion that there was a lack of convergence would have been natural; the majority used the political differences revealed by the evidence to find that a plurality of persons did not share a common criminal purpose, and concluded that such a purpose did not exist. Conversely, if the majority had objectively relied on the non-political, criminal purpose, as alleged in paragraph 6 of the Indictment, it would have observed that political differences do not automatically undermine "a common criminal purpose within the meaning of the law on JCE pursuant to Article 7 (1) of the Statute".[113]

80. In addition, the majority's flawed identification of the common purpose of the JCE has had adverse repercussions on the Judgment as a whole, for it appears as early as the introduction.[114] It permeates all the subsequent findings and conclusions of the majority. Thus the erroneous initial view also made it easier for the majority to reach its cursory conclusions, which exclude crimes against humanity by denying the existence of a widespread or systematic attack as part of the context in which the crimes occurred. I am all the more indignant about this as the Chamber had admitted considerable evidence to the record providing proof not only of the widespread and systematic attack, but also of the crimes, including persecution, deportation, forcible transfer and some war crimes particularly significant to the alleged JCE, such as destruction and devastation of villages. According to this line of reasoning, the only attack the majority recognises is a military attack.[115] Thus, by considering that the Prosecution's allegation concerned a political objective rather than a common criminal one, the majority did not even need to examine the crimes inherent to the alleged purpose – specifically deportation and forcible transfer. The majority only concedes a few war crimes in the field, all the while criticising the Prosecution for not having established a

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would then have suggested not pursuing a needless analysis, typical of the field of political science, rather than a legal analysis which should be the sole objective of any judgement.

[112] Judgement, para. 250.

[113] *Martić* Appeal Judgement, para. 123

[114] Judgement, para. 3.

[115] Judgement, paras 192-196.

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distinction between a possibly "legitimate" military campaign and "possible criminal behaviour."[116] I personally note that not even the Accused went that far in his defence.

81. As regards, in particular, the majority's analysis on the plurality of participants in the JCE, I am of the view that it is unsatisfactory not only for the reasons mentioned above, but also due to a misappreciation of the evidence on the record. The majority merely states that it "brings into question" the existence of a JCE between the alleged members.[117] What evidence gives rise to such questioning? Other than the political differences between Milošević and the Accused, the majority simply refers to a humble and honest Serbian officer – Witness VS-051[118] – who tried, in vain, to stop the carnage in Ovčara committed with the participation of the *Šešeljevci* and with the complicity of high-ranking JNA officers and the Serbian police who let it happen.[119]

82. On the question of how the common criminal purpose was shared by the Accused and the most important alleged members of the JCE in the Indictment, namely Slobodan Milošević and Željko Ražnatović, aka Arkan, the sparse evidence of political and strategic differences gained the upper hand in the majority's analysis, despite swathes of more relevant evidence pointing to the fact that these members worked in concert to forcibly and permanently drive out the Croats and the Muslims and other non-Serb populations from Serb-claimed territories and that they shared the same criminal intent.[120]

83. As regards, more specifically, the relations between the Accused and Milošević and the latter's participation in the alleged JCE, the evidence shows that, following their initial exchanges as early as 1991, the Accused and Milošević collaborated as part of their ideological convergence aimed at defending the Serb national cause and claiming control over "Serb" territories, which led to the sending of volunteers by the Accused between 1991 and 1993.[121] They had a bilateral relationship: Milošević supported the volunteers by providing logistical support, while the Accused executed Milošević's orders and requests on the sending of volunteers.[122] The evidence of a strong difference of opinion between the two men in the spring of 1993 because Milošević supported the

[116] Judgement, para. 16.
[117] Judgement, para 253.
[118] Judgement, paras 253-254.
[119] It also transpires from the evidence that there were a great number of such honest Serbian men and officers, also among the Prosecution witnesses.
[120] P1187, p. 1.
[121] Yves Tomić, T(E) 3104-3107; P164, p. 94; Zoran Rankić, T(E) 15908-15909, 15949; P63, p.1; P644, pp. 10-11 and 16-17; P90, p. 6; P01213, p. 1. *See* also P31, T. 43484-43485; 43488-43489.
[122] Yves Tomić, T(E) 3104-3107; C27 under seal, pp. 1, 4; P63, p.1; P633, p. 6; P644, p.5; 10-11. *See* also P31, T. 43484-43485, 43916-43917, 43930-43932, 43942-43944, 44323-44325. This collaboration was also political despite the Accused's position as an opposition member; he had, for instance, supported Milošević's government for a time (P31, T. 43306-43307; P164, p. 94).

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Vance-Owen plan,[123] and the fact that they did not cooperate before their conversation in 1991, does not undermine the conclusion that they shared the common criminal purpose to forcibly remove non-Serb populations - Croats and Muslims in particular - from territories they considered Serbian from a historical standpoint.

84. As regards the participation of Željko Ražnatović, aka Arkan, in the JCE argued by the Prosecution and the relation between this paramilitary leader and the Accused, despite the latter's statements that it was impossible to cooperate with Arkan, the evidence shows that in 1991 the volunteers were sent to the training camp in Erdut, which was coordinated by Arkan, who also received the Accused when he visited the camp.[124] The evidence shows that the SRS volunteers and Arkan's men participated in joint military operations, the objective of which was essentially to force the Serb populations to permanently leave the Serb-claimed territories.[125] According to the Accused's testimony in the *Milošević* case, it has also been proven that the SRS volunteers were instructed to keep away from Arkan's men.[126] These instructions were in fact issued after this paramilitary leader and his unit had engaged in plunder in Zvornik, as a result of which they were arrested by the RS police (and released shortly thereafter).

85. The majority completely – and deliberately – fails to analyse the Prosecution's allegations of the common criminal purpose shared by the Accused, Radovan Karadžić, Jovica Stanišić and Franko Simatović.[127] On the other hand, a lot of the evidence shows that there existed a strong *entente* between the Accused and Karadžić, including at a political level.[128] This *entente* manifested itself in the collaboration between their two parties – the SDS and the SRS.[129] After the establishment of the RS, this collaboration also materialised in the theatre of war, namely during operations to remove non-Serb populations from BiH territories, which they considered as Serbian territories for historical reasons.[130]

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[123] P164, pp. 94-95; P31, T. 43346-43349, 44026, 44045-44046; P644, pp. 23-24; P1012, p. 60. *See* also P164, pp. 92-93, concerning the Accused's statements against Milošević in 1995. Concerning their differences of opinion over the Vance-Owen plan, these differences were always political. In addition, this plan also provided for the separation of the three communities, which had already largely taken place before the plan was submitted.
[124] C12, para. 24; C15, p. 49; C18, para. 38; P527, para. 17.
[125] VS-1028, T(E) 12733-12734, 12738-12740; P1054, para. 23, P1187, p. 2.
[126] P31, T. 43662-43664, 43668-43669.
[127] The majority did not deem it necessary to respond to the Prosecution's allegations of the participation of these members of the JCE. I would have agreed with this lacuna if the existence of a JCE between the Accused and the other members had been established, but given the Majority's negative conclusion on this issue, I hold that it should have considered the other alleged participants.
[128] P1102, p. 2; P35, p. 7; P1339, p. 2; P1176, pp. 37-38; P644, p.15; P31, T. 43350-43351, 43980-43981; Jovan Glamočanin, T(E) 12863-12864; P34, pp. 1-2.
[129] P688, paras 49, 119; P34, pp. 1-2; P644, p. 15; Jovan Glamočanin, T(E) 12863-12864; P31, T. 44025-44026; P998, p. 9.
[130] P688, para. 49; Jovan Glamočanin, T (E) 12863-12864.

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86. As to the common criminal purpose shared by the Accused, Stanišić and Simatović, the evidence on the record shows that the Accused and his party– including his most loyal associates whom he deployed in certain localities as commanders of the volunteers[131] – had a privileged line of communication with the police and the security services of the Republic of Serbia, headed by these two members of the JCE.[132] These two men decided jointly to send volunteers to the front line, and regular contacts were established, from remote locations and through middle men, between them and the Accused to coordinate the efforts and actions of the SRS volunteers.[133] The conflict that erupted between them from 1993 onwards,[134] to which mainly the Accused attests, has no impact on their cooperation before or after the establishment of the RS.[135]

87. I believe that the only reasonable conclusion that the Chamber should have drawn from the abundant evidence in our possession is that there existed a plurality of persons who shared the common purpose of the alleged JCE.

88. Lastly, I hold that the only reasonable conclusion to be drawn from the evidence admitted in our case is that the Accused substantially contributed to the furtherance of the common criminal purpose. Evidence of the responsibility of the Accused for incitement and aiding and abetting, establishing his substantial contribution under these two forms of responsibility, provide all the necessary circumstantial evidence required to establish his substantial contribution to the alleged common criminal purpose, precisely through instigating and aiding and abetting the crimes.[136]

2. The *mens rea* of the participants in the alleged JCE

89. I cannot agree with the conclusions of the majority that the Accused and other members of the alleged JCE did not share the same criminal purpose since they engaged together in the defence of "the Serbs and the traditionally Serbian territories and at preserving Yugoslavia."[137] The flaws in the majority's reasoning pertain to its selective examination of some of the evidence which,

[131] C18, paras 49-50, 53; P644 pp. 18-19; P1058, para. 18.
[132] P633, p.11; P634, para. 20; C12, para. 6; C15, pp.15-17.
[133] VS-1112, T(E) 9176-9177 (closed session); P634, paras 20-21; P644, p.18; C12, paras 6-7, 19; C15, pp. 8-9, 26-27; C18, paras 47-50.
[134] P31, T. 43460-43462 ; Aleksander Stefanović, T(E) 12212-12213.
[135] Following the establishment of the RS, cooperation between the Accused and the police of this Republic becomes apparent.
[136] *See*, in particular, the evidence of Šešelj's speeches, often shared by other leaders who were members of the JCE, on the forcible take-over of some institutions in Croatia and in BiH, which are mentioned in other sections of this opinion. On the same subject, the strategic objectives decided by Karadžić and his party and executed by all the Serbian leaders in BIH and in Serbia, including Šešelj, are also particularly important: *see* para. 49 of the Judgement.
[137] Judgement, para. 258.

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moreover, is analysed separately, without adopting a global perspective or looking at the whole picture illustrated by the multitude of evidence admitted to the record.[138]

90. I am of the view that indirect and circumstantial evidence received by the Chamber would have made it possible to find, beyond all reasonable doubt, both that the Accused intended to commit the crimes of persecution, deportation and forcible transfer inherent to the furtherance of the common criminal purpose, and that he shared this intent with the other alleged members of the JCE. I can, for instance, recall the evidence of the Accused's continued promotion of his nationalist ideology by all means, his consistent repetition of speeches calling for deportation and forcible transfer, his repeated identification of the Croats as the Serbs' historic enemies, his advocacy of the principle of retaliation against the non-Serb populations, his role in organising the recruitment and deployment of volunteers and his regular visits to the Serbian forces in the field and the violent speeches he made on these occasions.

C. Instigation

1. Preliminary remarks

91. I do not share the majority's definition of instigation. In fact, according to Tribunal case-law, instigation means "to prompt another person to commit an offence".[139] The instigator must, in one way or another, have influenced the physical perpetrator by soliciting, encouraging or otherwise inducing him or her to commit the crime. However, this does not necessarily presuppose that the original idea or plan to commit the crime was generated by the instigator. Even if the principal perpetrator was already pondering on committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator.[140] Although the exertion of influence requires a certain capability to impress others, instigation – different from "ordering", which implies at least a factual superior-subordinate relationship - does not presuppose any kind of superiority,[141] which however, if proven, may be useful in determining the impact of instigation on the audience.

[138] Judgement, paras 231-238, wherein the analysis of the take-over of the municipal institutions is conducted without a wider perspective on the permanent removal of the non-Serb population from targeted areas, which was also carried out through this forcible take-over.
[139] *Kordić and Čerkez* Appeal Judgement, para. 27, upholding the *Kordić* Trial Judgement, para. 387. *See* also *Nahimana* Appeal Judgement, para. 480; *Ndindabahizi* Appeal Judgement, para. 117.
[140] *Orić* Judgement, para. 271.
[141] *Orić*,Judgement, para. 272.

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92. Yet, the majority added an additional standard, one not required anywhere in Tribunal applicable case-law, by considering that it was necessary to prove, in addition, that the Accused had resorted to various forms of persuasion, such as threats, enticement or even promises, before concluding that the Accused was responsible for instigating crimes.[142]

93. As I have already mentioned in the section on questions related to the evidence, I also disagree with the majority's decision not to consider as relevant evidence the speeches the Accused made outside the time period relevant to the Indictment, when this evidence was necessary not only to interpret the content and scope of the Accused's speeches made at the time relevant to the Indictment, but also to determine the Accused's *mens rea.*

94. Moreover, when the majority examined the available evidence of instigation, it conducted a "piecemeal" analysis, which, in light of the relevant case law, is a very questionable procedure. In fact, instead of analysing each piece of evidence in light of the overall evidence, the majority merely examined some of the speeches, and did so separately. Therefore, it decided generally to attribute only limited probative value to the speeches reported in press articles published in newspapers not originating from the Accused and not reproduced in his books, whose authors have not been heard as witnesses, and for which no other contextual evidence was provided,[143] although they could have corroborated other reliable evidence. The majority, furthermore, decided not to accept certain other speeches on the ground that they were speeches in support of the war effort or electoral speeches.[144] Through this piecemeal process, the Chamber reached its unreasonable findings on the speeches the Accused made on 7 November 1991 on the road to Vukovar, on 12 or 13 November 1991 in Vukovar, in March 1992 in Mali Zvornik, on 1 and 7 April 1992 before the Serbian Assembly, and on 6 May 1992 in Hrtkovci.[145]

2. Content of the Accused's speeches

95. I do not share the view of the majority, according to whom only three speeches made by the Accused during the period covered by the Indictment – the two speeches made on 1 and 7 April 1992 before the Serbian National Assembly and the speech made in Hrtkovci on 6 May 1992 – could be considered as calls for deportation and forcible transfer of the non-Serbs.[146] The evidence

[142] *See* para. 295 of the Judgement. The Prosecution does indicate that "instigation may take many forms such as promises, threats or abuse of power", but in support of this claim it refers only to Article 91 of the Criminal Code of Rwanda that is not applicable in the present case, and which, moreover, only applies to aiding and abetting in general. *See* the Prosecution's Pre-Trial Brief, para. 146 and footnote 498.
[143] *See* para. 301 of the Judgement.
[144] *See* para. 303 of the Judgement.
[145] *See* paras 303, 318, 328, 333, 343 of the Judgement.
[146] *See* paras 333, 335 of the Judgement.

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admitted to the record clearly shows that there were many other speeches made by the Accused which the majority should have taken into account.

96. If we only rely on the speeches made by the Accused in 1992, which have been reproduced in his books, I could quote, for instance, a press conference of 2 April 1992, in which the Accused stated :

> I said we ought to apply the legal principle of retort, i.e. the vengeance in international relations. For the number of Serbs expelled from the Croatian territory the same number of Croats should be expelled from Serbia. And that those expelled Serbs, first and foremost, ought to be moved into the houses and flats of Croats who would no longer be welcome in Serbia [...] In this case, the hatred between the Serbs and Croats has culminated to such a degree that any coexistence is impossible. [...] Those who responded to me at the National Assembly session [...] are against the principle "eye for an eye" and "tooth for a tooth", against the principle of vengeance [...] That is the principle of retort, one of the usual principles in the international law, by which all states are abiding.[147]

97. Let me also quote an interview of 7 April 1992, in which the Accused explained why he would be happy if his party won the elections and he were offered the position of Minister of the Interior or Minister of Police: "I would gladly accept it. However mainly in order to be at the head of this action of relocation of Croats from Serbia. [...] They would all leave in 24 hours."[148]

98. Likewise, in Exhibit P1194, an interview dated 7 April 1992, the Accused stated that there were only "16 good Croats who were allowed to remain in Serbia".[149]

99. Also, during a press conference held on 16 April 1992, the Accused told a journalist who asked him whether the newspaper *Borba* had correctly interpreted his statement in the parliament whereby all Croats should be expelled:

> This statement has been interpreted excellently. We sent a message to the Croats that they have no business in Belgrade and that they ought to move out as soon as possible. All Croats ought to move out of Serbia save for those – there are exceptions – who responded to the call-up immediately and who participated in our war undertakings and thus proved their loyalty to the Serbian state, but their number is minor.[150]

100. On 22 April 1992, during an interview, the Accused stated:

> I would expel the Croats for several reasons. First and foremost, *because the Croats are extremely disloyal as inhabitants of Serbia*, because the vast majority of them are members of the HDZ or act as their foreign collaborators, and that they are doing everything they can to destabilise the internal situation in Serbia. In addition to that, the Croats have proved to be direct collaborators to

[147] P685, pp. 10-11. This press conference was reproduced in his book *Milan Panić Must Fall.*
[148] P1194, pp. 15-16. This interview was published in his book *Television Duels* in 1993.
[149] P1194, p. 16.
[150] P685, pp. 33-34.

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> the Ustashas [...] Furthermore, we must apply the measures of retaliation against the Croats because Tuđman has expelled 160 000 Serbs.[151]

101. Numerous other testimonies and exhibits – not taken into account by the majority – corroborate the fact that between 1 August 1991 and 1 September 1993: (1) the Accused made inflammatory speeches in which he had, on numerous occasions, explicitly called for persecution, deportation and forcible transfer of the Croats and Muslims, which he described as "voluntary exchanges" or "civilised exchanges" of the population; (2) the Accused had openly advocated violence and ethnic cleansing as a means of serving the interests of the Serbian people when he urged the SČP/SRS volunteers - proponents of his ideology - the Serbian forces and Serbian public to "drive out all the Croats from Serbia", or when he referred to "an ethnic border of Greater Serbia", and when he insisted that it was no longer possible to live with the Croats and the Muslims; (3) the Accused had systematically denigrated the Croats and the Muslims in his speeches by using very derogatory terms such as "cowardly", "dishonest", "criminal" and "a people without a history" for the Croats, or *Balija,* Pan-Islamists or *Pogani*[152] ("pogani" meaning "faeces" according to the Accused) for the Muslims; (4) this denigration went hand in hand with dehumanisation, especially of the Croats, whom the Accused, at times, compared with mice, primates or vampires. I can cite, for instance, the testimonies of Anthony Oberschall,[153] of Goran Stoparić,[154] of VS-004,[155] the prior statements of several witnesses, [156] Exhibit P5,[157] the testimony of the Accused in the *Milošević*

[151] P43. This interview was published in his book entitled *Politics as a Challenge of Conscience.* During his testimony in the *Milošević* case, the Accused confirmed that he had spoken those words. *See* **P31**, Hearing of 15 September 2005, T. 44176-44178. It must be noted that this speech was made when Croatia was already independent and that, only a few days later, on 27 April, the leaders of the Federation took formal note of its independence.

[152] Regarding the translation of this term by Šešelj himself, *see* P31, Hearing of 5 September 2005, T. 43725. *See* also para. 325 of the Judgement.

[153] According to Witness Anthony Oberschall's analysis, the speeches made by the Accused included numerous references to deportation and forcible transfer, and the language and expressions used by the Accused encouraged violent behaviour. He also explained that the Accused had developed a sanitized speech on ethnic cleansing which he termed "a civilised exchange of population" and that the Accused distorted reality by talking about voluntary, reciprocated exchanges based on consensus and beneficial to the victims. *See* Anthony Oberschall, T(E) 2125-2126, 2131; P5, p. 24.

[154] Witness Goran Stoparić – a member of the SRS until he was expelled in 1993 – heard the speeches delivered by the Accused on several occasions: in the beginning, the Accused declared that a threat of war existed and that the Croats needed to be driven out; thereafter, he defended the principle of retaliation. According to this witness, this principle consisted of "paying them back in kind" meaning the Croats who had driven out a great number of Serbs from Croatia. *See* Goran Stoparić, T(E) 2328, 2335, 2438-2439, 2442, 2454 and the Hearing of 22 January 2008, T(E) 2607.

[155] According to Witness VS-004, the Accused's discourse was inflammatory and incendiary. He added that the Accused had made it a habit of stating that the Croats could live to the west of the Karlobag-Ogulin-Karlovac-Virovitica line. *See* VS-004, Hearing of 7 February 2008, T(E) 3376 and Hearing of 12 February 2008, T(E) 3387, 3395-3397.

[156] Witness Nebojša Stojanović, member of a JNA unit and a supporter of the SRS, indicated in his written statement that the Accused gave a speech to the volunteers that went to fight in Borovo Selo, in which he declared that the Chetnik Serbs had laid down their lives to defend Borovo Selo and that "no matter where the *Ustashas* were, they needed to be killed and expelled." In another prior statement, he specified that he had construed these statements as the Accused's desire to ethnically cleanse all parts of Croatia he believed belonged to Greater Serbia. According to him, the term *Ustashas* referred to the entire Croatian nation. See P526, paras 5, 8, 19; P258, paras 12, 32. Witness Zoran Rankić indicated in his prior written statement that, during the speeches he addressed to the volunteers going off to the front line, the Accused declared that the *Ustashas* should be killed and driven out of Serbian territories in order to create a

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case, filed under number P31,[158] Exhibit P75,[159] Exhibit P1199[160] and Exhibit P1201.[161] The majority of the Chamber seems to have discarded *outright* some of the speeches from its analysis.

102. Moreover, the majority of the Chamber erred in completely ignoring the allegation that the Accused instigated the commission of the said crimes by using denigrating language against the non-Serb populations.[162] Yet, we admitted to the record ample evidence in support of this allegation. It emerges clearly that the Accused used extremely violent and negative stereotypes to describe the Croats, and he dehumanised them by comparing them, for instance, to primates.[163] Likewise, during a television interview on 7 April 1992, the Accused stated: "I have been accused of being Slovenian, Croat and Albanian. Had they told me I was a Gypsy – fine, a Serb – fine, a Romanian – fine, a Slovak – fine, however they always pick something the worst for me. Slovenian, Croat or Albanian."[164]

Greater Serbia. *See* P1074, paras 36, 64. These statements have also been corroborated by those of Witnesses Zoran Dražilović and Nenad Jović. *See* C10, para. 28; P1085, para. 32.

[157] P5, p. 177, example no. 192. *See* also Anthony Oberschall, Hearing of 11 December 2007, T(E) 2033-2034, who mentions that during the interview on 4 August 1992, the Accused said the following: "Concerning the question of the exile of the Croats from Serbia, I believe that it is not contradicting any of the elementary democratic rights. Because if we look at the international experiences in that respect, we shall see that there is nothing new in this idea. The Germans were expelled from Poland; the Germans were expelled from Czechoslovakia, from the area of the Sudet. The Germans were expelled from Yugoslavia. Why not the Croats then? If this now is a crime against the Croats, then it had also been a crime against the Germans. Either we will expel the Croats now or bring back those Germans."

[158] *See* for example P31, Hearing of 6 September 2005, T(E) 43841, when the Accused admitted that during the interview of 24 May 1991, he had stated the following: "You know when one retaliates, revenge is blind. There would be innocent victims, too, but what can you do. Let the Croats think about that first. We shall not strike first, but if they should strike, we're not going to pay attention to where our blows land. Also, unless the army disarms the Ustashas immediately, there will be a lot of blood."

[159] This exhibit contains the speech made by the Accused on 1 April 1992 before the Serbian Assembly which is cited in the Judgment of the majority. *See* P75, pp. 2-3.

[160] P1199, pp. 3-4, a transcript of an SRS press conference held on 28 May 1992 at which the Accused stated: "The coexistence of Serbs, Croats and Muslims is simply not possible after this war. [...] I spoke of disloyal Croats who should be expelled to Croatia and Serbian refugees from Croatia should be settled in their houses. If the new Ustasha chief and Tito's general, Franjo Tudman, expelled 300,000 Serbs from Croatia then what business do 100,000 Croats have in Serbia? We have to settle these expelled Serbs somewhere, we will move them into Croatian houses and flats in Serbia and the Croats should go to Zagreb, Bjelovar, Rijeka, Daruvar and other places, let them move into the Serbian houses the Serbs were previously expelled from."

[161] P1201, p. 20, which reproduces an interview of 12 June 1992 during which the Accused stated: "As far as the persons of the Croatian nationality are concerned, all those – save for those who fought alongside us for the freedom of the Serbian Slavonija, who joined this war as reservists – all the others will have to move out according to the principles of reciprocity. I mean, since TUĐMAN expelled more than 300,000 Serbs, what are the Croats in Serbia waiting for. [...] where are we going to accommodate these expelled Serbs from Zagreb, from Rijeka, from Varaždin, from Bjelovar and other Croatian cities. [...] So, the most simple solution is to accommodate the largest part of them by directing them to the Croatian addresses in Zemun, in Slankamen, in Hrtkovci and in other places. They are going to move into Croatian houses and flats there, while the encountered Croats would be given all abandoned houses in Zagreb, Rijeka and other places."

[162] This allegation is noted in the section on allegations and arguments of the parties, *see* para. 287 of the Judgment, but is not included in the analysis the Chamber proceeds to make.

[163] During his testimony, Anthony Oberschall specified that the Accused used language in his speeches that encouraged violent behaviour; as an example, he quoted expressions such as "rivers of blood will flow" and terms like "amputate". *See* Anthony Oberschall, hearing of 13 December 2007, T(E) 2206.

[164] P1194, p. 23.

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103. The Accused's statements denigrating the non-Serb communities were not only provocative towards the members of these communities but also constituted incitement to commit acts of random violence and crimes against Croatian and Muslim civilians in furtherance of his plan for a state dominated by Serbs but, more importantly, cleansed of non-Serbs. In fact, we also had evidence on the record that showed that the Accused had broadcast images, slogans or violent expressions such as "rivers of blood will flow",[165] "we must finish them off" (speaking of the Croats and the Muslims,),[166] "more blood will be shed" (speaking of expulsions and "other acts" suffered by the Serbs),[167] "many more victims will fall",[168] "[the Serbs] have very good guns [...] it makes the Croat's eyes pop out, or [his] head is [...] severed from the body".[169]

104. Moreover, it was not necessary for the Accused to have called for the perpetration of each and every crime charged in the Indictment to establish that he had physically instigated their perpetration. It would be sufficient to establish – and the evidence on the record made this possible – that the speeches clearly targeted the entire Croatian and Muslim communities living in the territories of the former Yugoslavia, or were perceived by his audience as an instigation to violence against them.. Yet, the evidence the Chamber had in its possession demonstrated that, even if the Accused had sometimes made speeches that seemed ambiguous to the witnesses questioned, the Accused's audience clearly took his words to have a violent and inflammatory meaning in respect of the targeted community. In fact, calls to apply the principle of retaliation, vengeance and reprisals, to commit acts of ethnic cleansing, persecution, deportation and forcible transfer were made by the Accused, without specifying how to achieve this.

105. As I have noted already, the content of these speeches and of all other speeches, for which the Chamber had evidence,[170] should have at least been examined in light of the ICTY and, more specifically, the ICTR case-law that I mentioned earlier in the section on the responsibility of the Accused for physical perpetration. Had the majority conducted such an analysis, the only reasonable conclusion it should have reached was that, when the Accused used extremely violent

[165] Anthony Oberschall, T (E) 2125-2126.
[166] In a report broadcast on 13 May 1993, the Accused claimed that the Croats and the Muslims have long since ceased to represent any danger, and added that the next time they struck, they should be finished off so they could never strike again. *See* P18, p. 1.
[167] P10; P3, pp. 86-87; Anthony Oberschall, T(E) 1992-1994.
[168] During the interview given by the Accused on 25 July 1991, he claimed that there would be no large-scale conflict, no real civil war, but that "more blood will be shed" and that "many more victims will fall". *See* P10, p. 1; Anthony Oberschall, T(E) 1993; P3, Annex A, p. 87.
[169] This sentence was uttered during an interview broadcast on 1 June 1991. During this interview, the Accused also stated that he was impatiently waiting for the attack against the"Knin Krajina" [or "Kninska Krajina"] voted by the Croatian Parliament and planned for June 1991, that it seemed that the Croats had not really learnt their lessson in Borovo Selo and that they needed to be given a more severe lesson in June. *See* P13, pp. 1-2. *See* also Anthony Oberschall, T (E) 2001.
[170] This evidence is derived from all the exhibits already cited here, which contain the speeches, the source of which can be found in the Accused's books.

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and derogatory terms such as "to clean up Bosnia from the 'pogani'", he instigated the Serbs to "cleanse Bosnia of the Muslims" and therefore to drive them out of Bosnia. In the same vein, concerning, in particular, the speech made by the Accused in Mali Zvornik in March 1992, no reasonable trier of fact could have concluded that the content of this speech was not problematic, as the majority claimed.[171]

3. Means of dissemination of the speeches

106. Furthermore, the evidence established that all the Accused's remarks were widely disseminated, whether by television, radio, the written press (including foreign newspapers such as *Der Spiegel*), the publications of the Accused or even during speeches held at the federal assembly of Serbia. The majority could not thus have reasonable doubt, as it did in paragraph 342 of the Judgement, as to whether the perpetrators of the crime had heard the Accused's speeches, all the more so as the Accused's messages were always the same, irrespective of the means employed for their dissemination. On this point, I note that we received into the case file ample evidence of the Accused's speeches given to volunteers sent by the SRS to the front, before their departure and during visits the Accused made to the field of battle.[172] We also had extensive evidence indicating that the Accused's approval rating was extremely high during the period of the Indictment.[173] Therefore, even if there exists a possibility that the perpetrators of the crimes might not have heard all of the Accused's speeches, the only reasonable conclusion that can be inferred from all the evidentiary material tendered into evidence was that members of the Serbian Forces – including volunteers of the SČP/SRS - perpetrators of the crimes mentioned in the Indictment, were indeed well aware of the content of the Accused's violent speeches and his exacerbated nationalist

[171] *See* paras 319-328 of the Judgement.
[172] *See*, for example, Anthony Oberschall, Hearing of 12 December 2007, T(E) 2070-2071; P20, p. 1.
[173] *See*, for example, P34, pp. 8-9, in which it is indicated that during an interview published on 24 May 1991 in the Accused's book *Politics as a Challenge of Conscience* and entitled "Chetnik Revenge Will Be Blind", after the journalist reminded the Accused that the Croatian press was concerned by his popularity rating, the Accused pointed out that the *Borba* newspaper had just carried out a survey amongst students in order to find out in whom they had most confidence and the students had placed him third, after Dragoljub Mićunović and Slobodan Milošević; P1180, p. 1, which states that during an interview in June 1991, reproduced in the Accused's book *Sisyphean Trials,* published in 1992, the journalist reminded the Accused that he had been invited to come and reply to his questions on account of his overwhelming popularity; P1190, p. 4, which states that during an interview dated 16 January, published in his book *Sisyphean Trials,* the Accused learned that radio listeners in Serbia had voted him "Man of the Year"; P1201, p. 9, which states that during an interview of 12 June 1992, the Accused announced that his party had obtained far better results in the last federal elections than all the other opposition parties together in the 1990 elections; P1220, pp. 2, 12, which contains an interview with the Accused dated 18 May 1993, reproduced in his book *Party Scores And Political Balances,* in which the Accused states that he has a great deal of political influence in Bosnia, that thousands of Serbian volunteers listen to him and that he has influence over the Serbian fighters, and in the event of foreign military intervention, he will gain even more influence. The Accused acknowledges during that interview that his party is very popular and that his ever-growing popularity is due to the fact that he always says what he really thinks, contrary to other politicians. *See* also video extracts P70 and P339, which also confirm the tremendous popularity of the Accused. In Exhibit P339 for instance, the Accused can be observed as he is cheered and receives an ovation from a crowd made up of several thousand people including both civilians and soldiers.

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ideology, as well as of his reiterated and systematic appeals for the deportation and forcible transfer of non-Serbs.

107. The Chamber had furthermore received an expert report from which it learned that propaganda is defined as a systematic campaign exerted on the opinion of a population so as to influence it, indoctrinate it or win it over, and that it originates as a means of indoctrination and of conditioning citizens with the aim of inducing them to act in a chosen manner. Various propaganda techniques[174] are employed to convince, persuade and influence public opinion. These techniques focus on manipulating emotions and preconceptions, at the expense of the faculties of reasoning and judgement. In times of war, propaganda is used to dehumanise the enemy and provoke fear and hatred, by controlling the image the public has of the opponent.

108. On the basis of all the evidence in the case file, it is clear that the Accused employed, in his speeches and writings disseminated between 1 August 1991 and 1 September 1993, all the propaganda techniques described by the expert witness in his report and testimony, namely the relentless repetition of the same discourse, threats, victimisation, negative stereotyping and disinformation. I note, moreover, that the Accused was familiar with mass psychology which he was able to study as part of his doctoral studies on fascism and he himself stated during an interview in March 1993 that: "Words can be a very dangerous weapon. Sometimes they can pound like a howitzer."[175]

109. I agree that, as stated in paragraph 300 of the Judgement, the use of propaganda is not in itself a criminal act but, as the ECHR found, "it is vitally important that in their public speeches, politicians should avoid making comments likely to foster intolerance".[176] Moreover, all the evidence available to the Chamber in the case at hand demonstrates that the Accused had intentionally used persuasion techniques he had studied in order to instigate, either directly or indirectly, the supporters of his extremist and nationalist ideology, the Serbian Forces, including volunteers of the SČP/SRS, and the Serbian public in general, to drive out, by all and any means, the Croatian and Muslim populations from the territories which were perforce to be integrated into his "Greater Serbia". From the point of view of the *mens rea* of the Accused, it is also relevant to note that in the legislation of the former Yugoslavia, instigation was a criminal offence, which is also significant from the perspective of compliance with the subjective component of the principle

[174] For example, the distortion of history and the dissemination of false information, the use of slogans, negative stereotyping, the dehumanisation of the enemy and the repetition of messages.
[175] P1215, pp. 5-6.
[176] ECHR, Féret v. Belgium, no. 15615/07, 16 July 2009, para. 75.

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of legality.[177] Yet that also proves the Accused's intention to goad his audience into persecuting non-Serb populations on political and religious grounds.[178]

110. I am therefore satisfied that any trier of fact would have concluded that the only possible inference regarding this aspect is that the evidence in the case file demonstrates the Accused's intention to persuade his audience to commit some of the criminal acts alleged in the Indictment, in particular, the persecution, deportation and forcible transfer of the non-Serb populations from territories where they had lived for centuries.

111. I consider, moreover, that the incessant reminder of the genocide committed by the Croats during the Second World War, together with the repeated appeals for vengeance and reprisals, implicitly supported, in advance, the commission of all the crimes mentioned in the Indictment on the basis of the implicit idea that nothing was comparable to the commission of genocide. The sole limit I set in this instance concerns plunder: we have received considerable evidence which proves that the Accused did not condone plunder, but that he often condemned it.

112. I am therefore satisfied that with regard to the other crimes alleged in the Indictment, such as murder, torture, cruel treatment, the wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to religion or education, the only possible conclusion any trier of fact should have reached is that the Accused took the risk that his speeches inciting, in particular, acts of reprisal and vengeance, and his discourse denigrating and dehumanising the Croatian and Muslim communities, would be perceived as implying the commission of those crimes for the purpose of carrying out deportations and forcible transfers. Yet, in total disregard of the relevant case-law of the Tribunal, as I have already noted in the section regarding inadequate reasoning, in its analysis of instigation, the majority failed to take *dolus eventualis* into consideration .

4. Impact of the Accused's speeches

113. I also do not agree with the position of the majority of the Chamber whereby speeches made by the Accused on 1 and 7 April 1992 could not have had an influence beyond the month of April

[177] Pursuant to Article 134 of the Criminal Code of the former Yugoslavia in its new version adopted in 1990.
[178] I rely here on all the aforementioned evidence relating to the systematic denigration by Vojislav Šešelj of the non-Serb populations, to his speeches and his spreading of a climate of fear amongst the civilian population. I can also refer for example to the testimonies of Aleksa Ejić, Franja Baričević, VS-1134 and Katica Paulić, according to which Vojislav Šešelj insulted and humiliated the Croats in his speech at Hrtkovci on 6 May 1992, by describing them as disloyal and claiming that they were the enemy of the Serbian people. According to these witnesses, Vojislav Šešelj also called for discrimination and the use of violence against the local Croatian population, notably by proclaiming that mixed marriages between Croats and Serbs should be dissolved. *See* Aleksa Ejić, Hearing of 7 October 2008, T(E) 10341-10342, 10358-10359; Franja Baričević, Hearing of 14 October 2008, T(E) 10624; VS-1134, Hearing of 15 October 2008, T(E) 10775; Katica Paulić, Hearing of 19 November 2008, T(E) 11931.

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1992,[179] thus requiring implicitly that the Accused's acts of incitement have an immediate effect, which means that for the majority of the Chamber, the Accused's acts of incitement had to be "direct". Yet, with regard to this issue, the majority confuses the crime of instigating genocide, which necessarily involves direct and public denigration and for which there must exist a correlation between the place and time of the speech and the resulting crime of the perpetrator, with instigation as a mode of participation in any of the crimes under the Statute for which, in light of case-law, this correlation is not required.[180] Therefore, it was unreasonable of the majority to require the Prosecution to furnish proof that the speeches made by the Accused on 1 and 7 April 1992 produced an immediate effect.

114. The majority, in paragraph 334 of the Judgement, criticises the fact that in his analyses Witness Oberschall allegedly did not take account of the context in which the Accused made his speeches. It is clear from this criticism that it refers both to the context of war which could, according to the majority, extenuate rather than aggravate the impact of instigation, and the context of electoral propaganda which, in its opinion, could justify a degree of "exaggeration". Admittedly, in the report's section presenting the impact of the Accused's speeches, the witness did not take account of these contextual elements in the manner the majority considered appropriate.[181] Moreover, according to the relevant case-law, the context of inter-ethnic armed conflict or mere inter-ethnic confrontation is pertinent in order to assess that impact, but contrary to the majority's view, it can aggravate, and not extenuate, the "inflammatory" impact of the speeches.

115. Unfortunately, the raison d'être behind this disregard on the part of the majority is to be found in the basic premise that the context of war, instead of aggravating the scope and impact of hate speeches, would justify those speeches as being a form of violence inherent to a situation of armed conflict. The majority of the Chamber reached such a justification without any difficulty, by relying on the assumption that the Serbs waged a war for which the defence of their interests "could provide a strong justification".[182] As I have already pointed out, this is, moreover, in violation of the mandate of the Chambers of the Tribunal, which is not to question whether or not the war is legitimate, but exclusively to determine whether or not war crimes and/or crimes against

[179] *See* paras 342-343 of the Judgement.
[180] *See* judgements: *Orić*, paras 271-273; *Blaškić*, paras 270, 277, 280; *Brđanin*, para. 269; *Limaj*, para. 514; *Prlić*, Vol. I, paras 224, 226; *Kordić and Čerkez*, para. 387; *Naletilić*, para. 60; *Kamuhanda*, para. 593; *Kajelijeli*, para. 762; *Đorđević*, para. 1970; *Milutinović,* para. 83; *Kayishema*, para. 200; *Semanza*, para. 381; *Kajelijeli*, para. 762; *Kamuhanda*, para. 593; *Gacumbitsi*, para. 279. *See* also *Akayesu* Appeal Judgement, paras 471 *et seq*, 478, 483.
[181] Anthony Oberschall, Hearing of 12 December 2007, T(E) 2155-2160.
[182] *See*, for example, para. 241 of the Judgement, wherein the majority states that the recruitment and deployment of volunteers by the Accused and his party, and the cooperation to this end with other Serbian forces, including the JNA/VJ, MUP, TO and other paramilitary groups, does not constitute unlawful activity. On the contrary, the context of war could have given him a strong justification; para. 355 of the Judgement, wherein the majority states that it cannot rule out that the Accused had given legitimate support to the war effort.

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humanity have been committed and whether or not the individual accused of having participated in the commission thereof is guilty beyond all reasonable doubt, on the basis of the evidence tendered into the case file.

116. Furthermore, with respect to the context of electoral propaganda involving a political figure such as the Accused, a context which was considered by the majority of the Chamber as further justification for his "hate" speeches,[183] I must recall the case of *Féret v. Belgium*, that I referred to in the section on the physical commission of the crime.[184] In that case, the ECHR stated that "it is vitally important that in their public speeches politicians should avoid making comments likely to foster intolerance" and that "politicians should be particularly mindful in terms of the defence of democracy and the principles thereof as their ultimate goal is the very acquiescence of power".[185] The ECHR further argued that "although in an electoral context, political parties must enjoy a broad freedom of expression in order to try to persuade their voters, in the case of racist or xenophobic speeches, such a context contributes towards increasing hatred and intolerance because, by necessity, the positions of the candidates for election become more rigid and the slogans and catchphrases more stereotypical and thereby prevail over reasonable arguments. The impact of a racist and xenophobic speech is therefore greater and more damaging."[186] Thus, in the case of *Zana v. Turkey*, the ECHR did not find that the State had violated Article 10 of the Convention protecting freedom of expression, after concluding that a statement coming from a political figure who was well-known in the south-east of Turkey - as the applicant was the former mayor of Diyarbakir, the most important city in south-east Turkey - which was published in a leading national daily newspaper supporting the national liberation movement of the PKK at a time which coincided with the murder of civilians by PKK militants, could, while serious disturbances were raging in that region, have an impact regarded as likely to exacerbate an already explosive situation in that region.[187] Likewise, in the case of *Sürek v. Turkey*, the ECHR did not find that Article 10 of the Convention had been violated after noting that "hate speech and the glorification of violence" was at issue and underlining the role of a newspaper owner "which assume[s] an even greater importance in situations of conflict and tension".[188]

117. Therefore, on the basis of a proper analysis of applicable law and the evidence in the case file, no trier of fact could reasonably find, as the majority did, that the impact of the Accused's "inflammatory" speeches could be justified on account of the violence inherent to war, that the

[183] See paras 303, 338, 340 of the Judgement.
[184] See supra, para. 57.
[185] ECHR, Féret v. Belgium, no. 15615/07, 16 July 2009, para. 75; ECHR, Erbakan v. Turkey, no. 59405/00, 6 July 2006, para. 64.
[186] ECHR, Féret v. Belgium, no. 15615/07, 16 July 2009, para. 76.
[187] ECHR, Zana v. Turkey, no. 69/1996/688/880, 25 November 1997, paras 50, 60.

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background of electoral propaganda against which some of the speeches were made would have been such that they were perceived by the audience as mere "exaggeration", and that they did not have the effect of seriously disrupting social peace between the various communities. I would point out in this regard the importance of taking into consideration, in the opposite sense to that advocated by the majority, the cultural, historical and political context and the "resurgence of ethnic tensions" in order to analyse the effect of some speeches, which is unanimously considered as crucial to the assessment of the content, effect and impact of a speech defined as "hate" speech, in contrast to speeches authorised under freedom of expression. That aspect has always therefore been taken into account in the case-law of the ECHR in its assessment of the limits to such freedom, as noted in the section on the physical commission of the crime.[189]

118. I am thus satisfied that, at variance with the approach pursued by the majority, any trier of fact would take into consideration the fact that the Accused made his speeches and promoted his extremist and nationalist ideology at a time when the former Yugoslavia was disintegrating - or had already disintegrated although this was still under dispute - and against the background of severe inter-ethnic tensions and, ultimately, the eruption of an armed conflict in which crimes against humanity and violations of the laws or customs of war were committed by reason, *inter alia*, of the speeches of the Accused.

119. Against such a background, the Accused's speeches could not by any means have been inoffensive or neutral. His words and actions disseminated through his propaganda could be nothing other than exceptionally dangerous, and also resulted in the commission of crimes for the purpose of evicting the non-Serb population. The Chamber moreover has at its disposal numerous evidentiary materials which prove that the Accused aggravated the climate of fear existing at that time, notably among the Serb and non-Serb civilian population, by repeating, through violent speeches, that the survival of the Serbian people was at stake and that the Serbian people would be subjected to the new genocidal doctrine of the new Croatian leadership, and by threatening the Croats with retaliation and unrestrained revenge, including for the crimes committed during the Second World War.

120. Moreover, the evidence in the case file established that the Accused's acts of incitement had a particularly significant impact on members and volunteers of the SČP/SRS, who considered him a God, and on supporters of his extremist and nationalist ideology among the Serbian forces over

[188] ECHR, Sürek v. Turkey, no. 26682/95, 8 July 1999, paras 62 in fine, 63.
[189] *See* the section on the physical commission of the crime.

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whom he exerted considerable moral authority,[190] which incidentally the majority of the Chamber noted but failed to draw from that the sole reasonable conclusion possible.[191] It is furthermore apparent from this evidence that the lack of discipline, which could be noted occasionally among the volunteers when individuals other than the Accused gave them certain orders concerning their deployment, was not such as to diminish the moral authority the Accused exerted over them.

121. It is also apparent from direct and circumstantial evidence mentioned in this analysis that by way of his speeches inciting the alleged crimes, the Accused substantially contributed to the commission of these crimes.

122. The evidence also establishes that the Accused was aware of the fact that the background of war against which he made his speeches aggravated their impact.[192] He was likewise aware that the context of electoral propaganda in which those speeches were made did nothing to diminish the explosive force of their impact, because he was also conscious of his influence over members of his party, the Serbian forces, including volunteers of the SČP/SRS, as well as the supporters of his extremist and nationalist ideology and the Serbian public in general.[193] The Accused was furthermore aware that crimes are committed in times of war,[194] and that violent speeches of incitement would increase the probability of such crimes being committed. He was also aware of the events on the ground.[195]

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[190] Reynaud Theunens, Hearing of 19 February 2008, T(E) 3811, 3814-3817, 3823; Yves Tomić, Hearing of 30 January 2008, T(E) 3035; P1012, p. 58; P217, p. 3; Statement of the Accused pursuant to Rule 84 *bis*, Hearing of 8 November 2007, T(E) 1921-1922; Perica Koblar, Hearing of 10 June 2008, T(E) 8011; P1056 under seal, paras 37-38; P1058 under seal, paras 45-46; Fadil Kopić, Hearing of 9 April 2008, T(E) 5912-5913; VS-033, Hearing of 1 April 2008, T(E) 5543-5544 (private session); VS-007, Hearing of 16 April 2008, T(E) 6097-6099 (closed session); P31, T. 43192-43191; P688, para. 103; Statement of the Accused pursuant to Rule 84 *bis*, Hearing of 8 November 2007, T(E) 1914-1915, 1930.

[191] *See* para. 341 of the Judgement.

[192] *See* for example P1190, p. 4, referring to the interview with the Accused of 16 January 1992; also P1205, p. 4, on another interview of the Accused with the television channel *Pale* broadcast in September 1992.

[193] *See* for example Statement of the Accused pursuant to Rule 84 *bis*, Hearing of 8 November 2007, T(E) 1914-1915, 1930, wherein the Accused stated that he was aware of his ability to influence people through his speeches and that he gave inflammatory speeches which could even incite a war; P31, Hearing of 31 August 2005, T. 43513-43514; P1248, p. 6, which is a transcript of an interview dated 15 February 1994 in which the Accused stated that following the elections of 1990 and the establishment of *Republika Srpska*, the influence ratio on public opinion was 2/3 for the SDS and 1/3 for the SRS; P34, pp. 8-9; P1180, p. 1; P1190, p. 4; P1201, p. 9; P1264, p. 25, which states that in newspaper articles dated 15 August 1990, reproduced in his book *The Serbian Chetnik Movement,* the Accused claimed: "We now have a powerful weapon in our hands, the newspaper *Velika Srbija"*; P1074, para. 36, preliminary statement in which Witness Zoran Rankić claimed that the Accused was perfectly aware of the impact of his speeches and public appearances, and knew that he could encourage people to commit acts they otherwise would not have committed.

[194] I note that Vojislav Šešelj himself does not deny this and even admitted it during his submission pursuant to 98 *bis*. *See* Hearing of 7 March 2011, T(E) 16645, 16658.

[195] Regarding the numerous visits Vojislav Šešelj made to the field during the period of the Indictment, see for example Goran Stoparić, Hearing of 15 January 2008, T(E) 2314, 2337-2339; VS-007, Hearing of 15 April 2008, T(E) 6069-6071 (closed session); VS-002, Hearing of 6 May 2008, T(E) 6458 and Hearing of 7 May 2008, T(E) 6556-6557; Vesna Bosanac, Hearing of 5 November 2008, T(E) 11421-11422; VS-004, Hearing of 12 February 2008, T(E) 3413-3416, 3468-3469 and Hearing of 13 February 2008, T(E) 3505-3509; Mladen Kulić, Hearing of 4 March 2008, T(E) 4455-4456; Jelena Radošević, Hearing of 23 October 2008, T(E) 11089-11090; P580, para. 22; Ibrahim Kujan, Hearing of 22

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123. I am thus satisfied that the sole reasonable conclusion the Chamber should have drawn in this case was that the Accused committed, during the period of the Indictment, acts of instigation with the requisite *mens rea*, and that those acts substantially contributed to all the crimes against humanity and the violations of the laws or customs of war mentioned in the Indictment (with the exception of plunder) and which were committed by members or volunteers of the SČP/SRS, and by supporters of the extremist and nationalist ideology of the Accused who were in the Serbian forces, in particular those identified as "Chetniks".

D. AIDING AND ABETTING

1. Preliminary observations

124. The perfunctory approach adopted by the majority to respond to the Prosecution's allegations and arguments, the lack of a coherent analysis and reasoning to explain why the majority relied on one item of evidence over another, and the disregard for the case-law of the Tribunal, become even more apparent on reading the section of the Judgement relating to aiding and abetting.

125. I note that, while it is true that for this form of responsibility the Prosecution relies "in part"[196] on the same "factual basis" as for JCE and instigation, contrary to the opinion of the majority,[197] this is not relevant in terms of the legal analysis of that form of responsibility, whose conditions differ from those of JCE and instigation.

126. In point of fact, according to case-law, in order to establish the *actus reus* for aiding and abetting it suffices to demonstrate that the acts or omissions in relation to providing practical assistance, encouragement or moral support for the commission of the crime substantially contributed to the commission.[198] With regard to the *mens rea* of the aider and abettor, not only must he be aware that his acts or omissions contribute to the commission of the crime by the principal perpetrator,[199] but also of the essential elements of the crime which is committed,[200]

July 2008, T(E) 9645-9646; VS-033, Hearing of 1 April 2008, T(E) 5529-5538 (including private session); P1074, paras 33, 39, 42-45, 67, 80, 112, 125; P1075, para. 21; P633, pp. 13-14; P634, paras 26, 31; P688, paras 50, 99; P1191, p. 6; P513; P1189, p. 26; P1190, p. 13; P34, p. 5.

[196] And not completely, as the majority claims. *See* paras 17, 18 and 218 of the Judgement.

[197] *See* para. 354 of the Judgement.

[198] *Popović et al.* Appeal Judgement, para. 1732; *Šainović et al.* Appeal Judgement, para. 1649; *Stanišić and Simatović* Judgement, para. 1264; *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blaškić* Appeal Judgement, para. 46 citing *Blaskić* Judgement, para. 283 citing in turn *Furundžija* Judgement, para. 249.

[199] *Popović et al.* Appeal Judgement, paras 1732, 1794; *Perišić* Appeal Judgement, para. 48; *Stanišić and Simatović* Judgement, para. 1264; *Lukić and Lukić* Appeal Judgement, paras 428 and 440; *Haradinaj et al.* Appeal Judgement,

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including the intent of the principal perpetrator.[201] However, the aider and abettor need not necessarily know which precise crime will be committed, and was in fact committed: "If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[202]

127. A comparison need only be made between the applicable law on responsibility for aiding and abetting and the law on responsibility for instigation - which concerns a specific crime – as well as the law on responsibility for JCE – which concerns a common purpose – in order to realise that, firstly, the requisite conditions for each of these modes of responsibility are different and, secondly, the line of reasoning of the majority is incoherent and lacks grounds.

128. I should also like to point out that, during this analysis, I will not take into consideration the speeches of the Accused which the Prosecution also alleges as aiding and abetting and which the majority described as nothing more than "nationalist" propaganda, since I primarily considered them in the section on responsibility for instigation. In point of fact, the analysis undertaken relating to instigation and the content and impact of those speeches on the Serbian forces, including the *Šešeljevci*, also proves that Šešelj substantially contributed to the perpetration of the crimes committed by volunteers whom he had sent to the front. I shall therefore confine myself to making some observations, in light of the evidence in the case file, on the other forms of assistance charged by the Prosecution under aiding and abetting which the majority failed to take into account.

2. Forms of assistance and moral support provided

129. It must above all be stressed that it is apparent from the evidence tendered into the case file that Vojislav Šešelj exercised absolute authority over his party, which he ruled with an iron fist, and that nothing could be done without his prior agreement.[203] From this, it can indeed be inferred that

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para. 58; *Simić et al.* Appeal Judgement, para. 86; *Blagojević and Jokić* Appeal Judgement, para. 127; *Krnojelac* Appeal Judgement, para. 52; *Tadić* Appeal Judgement, para. 229.

[200] *Popović et al.* Appeal Judgement, paras 1732, 1794; *Šainović et al.* Appeal Judgement, para. 1772; *Perišić* Appeal Judgement, para. 48; *Lukić and Lukić* Appeal Judgement, paras 428, 440; *Haradinaj et al.* Appeal Judgement, para. 58; *Simić* Appeal Judgement, para. 86; *Orić* Appeal Judgement, para. 43.

[201] *Popović et al.* Appeal Judgement, para. 1732; *Šainović et al.* Appeal Judgement, para. 1772; *Haradinaj et al.* Appeal Judgement, para. 58.

[202] *Blaškić* Appeal Judgement, para. 50, citing *Blaškić* Judgement, para. 287, citing in turn *Furundžija* Judgement, para. 246; *Popović et al.* Appeal Judgement, para. 1732.

[203] He was in fact described as an "autocrat who dictated all the actions of the SRS" and he was also considered a "dictator": whoever disagreed with him was considered a traitor and threatened with expulsion from the party. Likewise it was claimed that "there is no democracy with him". *See* C13, pp. 9, 26-27; P1077, paras 10, 13, 16; P1074, pp. 19, 40; P1085 under seal, paras 19, 27; Nenad Jović, T(E) 16232-16234; P688, paras 28-29, 36, 50, 56-57, 59, 94-97; P1074, paras 19, 38; C18, para. 17; P840, para. 89; Glamočanin, T(E) 12836; P1058, under seal, para. 103; P1076 p. 5.

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he was personally involved in providing assistance to the *Šešeljevci* for their deployment in the field where they committed the crimes, some of which were recognised by the Chamber unanimously.[204]

130. We have admitted evidence to the record which proves that individuals who were fit to bear arms answered an appeal from the SRS/SČP – the SČP being, according to the evidence, the "military wing" of the SRS.[205] That appeal encouraged men to volunteer to fight and defend Serbian interests.[206] Thus, rather than presenting themselves individually in order to register directly onto the volunteer lists of the Yugoslav Armed Forces, as specified by law,[207] the individuals who answered the call first presented themselves at the SČP/SRS headquarters. In this type of enrolment process, their criminal records were not checked.[208] More often than not, the enrolment process was an occasion for them to become members of the party as well, and they were given the magazine *Velika Srbija.*[209]

131. Those volunteers were for the most part assembled in groups by Šešelj's staff at a location close to party headquarters where the Accused would meet them and indoctrinate them with his extremist and nationalist ideology, thus preparing them to fight for the defence of Serbdom and to participate in the ethnic cleansing of the territories coveted for a Greater Serbia.[210] These volunteers were subsequently sent to the field with one of the party leaders, in buses chartered by the party[211] or provided by the official armed forces.

132. Upon their arrival in the deployment area which, more often than not, was selected by Šešelj himself – on behalf of the Crisis Staff initially, and of the SČP/SRS War Staff thereafter -[212] they would receive uniforms and weapons which were normally provided by the Armed Forces.[213] In point of fact, the SČP/SRS also organised their formal incorporation into the Yugoslav Army or the

[204] *See* paras 207 – 210, 213, 126, 219, 220 of the Judgement.
[205] According to Witness Yves Tomić, since its formation, the Chetnik movement was a military movement: "The word Chetnik (*četnik)* derives from the word *četa*, meaning an armed band or detachment. A Chetnik is therefore a member of an armed guerrilla band. The Chetnik phenomenon thus refers primarily to a particular mode of armed or military action." P164, pp. 38, 40 - 43, 57, 73; Tomić, Hearing of 29 January 2008, T(E) pp. 2870, 2875, 3038 and 3039. *See* also C26 under seal, p. 6; P1074, paras 17, 18; P1075, para. 9; P206, pp. 16, 17; P633, p. 5, describes the members of the SČP as the "extremist wing" of the SRS.
[206] VS-008, T(E) 13287, 13289 and 13290 (closed session); Reynaud Theunens, T(E) 3717 – 3720; P1053 paras 8, 9; P 1077, para. 20; P1085 under seal, para. 29.
[207] Law On All People's Defence, 1982, Reynaud Theunens, T(E) 3652, 3713, 3714-3719; P193, Article 118.
[208] VS-1058, T(E) 15641, 15650; P1053, paras 13, 15. No selection process during recruitment: VS-1058, Hearing of 9 March 2010, T(E) 15629, 15631-15633; VS-038, T(E) 10196 (public) - 10198 (private session); VS-008, T(E) 13299 - 13302 (closed session); C13, p. 47, Šešelj had no interest in the Geneva Convention; often, they were even accommodated for some days in the party's apartments in Belgrade, whilst waiting to be deployed to the field.
[209] P1077, para. 10; P1280; P1289; P1290.
[210] P1074, para. 36; P528, paras 31, 32; C10, para. 28; P1053, paras 13, 14; P1077, para. 20; P01085, under seal, para. 32. Šešelj said to the volunteers before departure: "Be heroes, kill the Ustasha, fight for a Greater Serbia."
[211] P1077, para. 12.
[212] *See* paras 60 and 61 of the Judgement.
[213] P1053, paras 14, 16; P1077, para. 13; C10, para. 29; VS-007, T(E) 6056, 6102; Zoran Rankić, Hearing of 11 May 2010, T(E) 15927, 15928.

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local TO, and for that purpose, at the start of the conflict, the Accused dealt with all the contacts with the leadership of the Army and subsequently, as the JNA gradually disintegrated, with the Serbian police force, which also included members of the SRS in its ranks.[214] Following the establishment of RS, the *Šešeljevci* were incorporated into the Armed Forces of that republic.[215]

133. The SRS also ensured that the volunteers were able to remain in contact with their families[216] and that, throughout their military service, they received remuneration from the public institutions or private companies in which they had worked prior to their recruitment.[217] This was an additional reason for enrolling under the extremist nationalist "flag" of the SČP/SRS. This brings me to the end of my examples of assistance provided by the SRS, although there are many others in the case file.

134. We ultimately admitted evidence to the case file which establishes that the former Yugoslav Armed Forces and those of RS turned to Šešelj for the recruitment of volunteers,[218] as their leadership were well aware that those volunteers were particularly efficient in defending the interests of the Serbs in all territories of the former Yugoslavia, rather than the territorial integrity of the Federation.[219]

135. The recruitment of volunteers through the parties was not provided for by law, but it was not prohibited either – and, moreover, the Prosecution did not allege the contrary. What is relevant here is that recruitment through the SČP/SRS rendered the recruitment of volunteers, as well as their deployment in the field, more organised, efficient and expeditious, as expert Reynaud Theunens rightly pointed out,[220] and this ensured that fighters who were the most committed and loyal to the Serbian nationalist-extremist cause were enrolled into the Serbian Armed Forces.

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[214] P299; P843, para. 15; P688, para. 51; VS-034, statement of 14 and 19 June 2006, para. 33. *See* also paras 128-133 of the Judgement.
[215] Following the establisment of the RS, the *Šešeljevci* were incorporated into the Armed Forces of that republic: P31, pp. 44149-44150; VS-007, Hearing of 15 April 2008, T(E) 6056 and 6057.
[216] VS-007, T(E) 6038 (an insider witness explains that the SRS volunteers had permits to go and see their families); P368; C10, para. 29; P1077, para. 14; P1085, para. 20.
[217] VS-033, Hearing of 1 April 2008, T(E) 5505 – 5509; Zoran Rankić, Hearing of 11 May 2010, T(E) 15929; P1077, para. 14.
[218] Reynaud Theunens, T(E) 4079-4080. During the testimony of Theunens, the Prosecutor explained: "SRS/SČP volunteers were operating under the command of the JNA, well, that is not in dispute by the Office of the Prosecutor. That is, indeed, what we're saying. The case is in - well, an additional issue as to whether or not the accused also had control at the same time over his volunteers, and we've heard evidence about that, and there would be more evidence about that during the case."; P688, paras 49, 51.
[219] The JNA resorted to volunteers of the SRS, given that non-Serbs had deserted, and that the Serbs themselves refused to continue to provide assistance to an army that continued to use the insignia from the period of communism (*see* Reynaud Theunens, T(E) 3948-3949, 3953; Zoran Rankić, T(E) 15916-15917, 15920-15921; P31, T. 43904-43906; P55, p. 3; P264; P644, p. 16; P648; P652; P942; P1064; P1065; P1074, paras 29, 45, 87-89; P1076, p. 25; P1111, p. C18, paras 32-33).
[220] Reynaud Theunens, T(E) of 20 February 2008, pp. 3936, 3944 and 3945.

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3. Assistance provided as a form of criminal complicity with the *Šešeljevci*

136. I am unable to share the majority's point of view which considers relevant the fact that the material or moral aid and encouragement alleged by the Prosecution is based on lawful activity.[221] Moreover, I note in this respect that the majority did not even attempt to provide reasons for its point of view, even though this is at variance with case-law. In point of fact, according to case-law, the criminal conduct of aiding and abetting may stem from a lawful action if such action facilitates or substantially contributes to the commission of the crime – the *actus reus* of aiding and abetting – and if such conduct is accompanied by the requisite *mens rea,* namely awareness that this assistance substantially contributes to the commission of the crimes or the fact of taking the risk that they might be committed.[222]

137. The confusion between assistance as pure fact – even if legal and not prohibited – and aiding and abetting as a legal fact, consisting of complicity with the perpetrator of the crime, is most evident when the majority argues that it could not exclude the possibility that "the Accused was simply providing legitimate support for the war effort".[223] This certainly was support for the war effort, but it is definitely not within the jurisdiction of the Chamber to determine whether that support was lawful. Furthermore, finding the support lawful does not preclude that it might aid and abet the commission of the crimes. This is the question, linked to the Prosecution's allegation, to which the majority should have responded, and it failed to do so. What is more, the majority of the Chamber did not even address the issue.

138. In point of fact, any assistance to an armed force is ordinarily given to support the war effort and defeat the common enemy. In principle, therefore, anyone who supports an army in the war effort does not do so with the specific intention that crimes will be committed.[224] Yet support for the war effort as a pure fact may be legally qualified as aiding and abetting as a form of criminal

[221] *See* para. 355 of the Judgement. In any event, according to the evidence, the Accused had started to recruit volunteers before it became legal after the declaration of war with Croatia, which subsequently led to the decree on engaging voluntary units in the Armed Forces, in autumn 1991. *See* Reynaud Theunens, Hearing of 19 February 2008, T(E) 3774 and Hearing of 28 February 2008 T(E) 4299, 4301; P688 paras 47, 56: according to Witness Jovan Glamočanin, the SRS started to recruit Chetnik volunteers in the spring of 1991; P1074, para. 26 (according to Witness Zoran Rankić, the Crisis Staff of the SRS was established in April 1991 and its role was to gather volunteers and financial aid and send both to areas inhabited by Serbs and affected by the armed conflict between the Serbian and Croatian forces); Aleksandar Stefanović, Hearing of 25 November 2008, T(E) 12115-12118, 12122; P634 paras 16-17; P633, pp. 5, 8 (according to Witness Aleksandar Stefanović, the War Staff was established in May 1991 in order to organise the transport of Serbian volunteers who reported to the SRS - driven by a personal desire to assist the Serbian people and by nationalist considerations - to JNA barracks, particularly those located near the front in Slavonia); P1053 under seal, para. 7; P1054 under seal, para. 7; C13 pp. 12-14.

[222] *Popović et al.* Appeal Judgement, para. 1765; *Šainović et al.* Appeal Judgement, paras 1656, 1663; *Blagojević* Appeal Judgement, paras 202, 203.

[223] *See* para. 355 of the Judgement.

[224] In the case at hand, it would even be possible to reach such a conclusion on the basis of evidence concerning the *mens rea* of the Accused for the crimes of deportation and forcible transfer, as argued by the Prosecution. *See* para. 607, the Prosecution's Closing Brief.

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complicity where it substantially contributes to the crimes and is accompanied by the requisite *mens rea* of the "contributor". The majority thus unreasonably went no further than giving minimal consideration to the pure fact of support for the war effort and failed to undertake a legal analysis on the basis of some of the facts that it had nevertheless ascertained.

139. I have already mentioned the strong moral authority Vojislav Šešelj enjoyed among the SRS volunteers and other supporters of his ideology, which was even acknowledged by the majority, although they did not draw any implications regarding either instigation or aiding and abetting.[225] Yet, in order to assess Šešelj's possible contribution to the commission of the crimes in this latter category, the most relevant evidentiary material is that which establishes that after Vojislav Šešelj, had personally deployed some of the *Šešeljevci* units to Croatia and Bosnia and Herzegovina, he, exercised a *de facto* authority over them.[226] Šešelj personally appointed a number of commanders from among the volunteers who, as often as not, had already received the title of *Vojvoda* from him or obtained it on accomplishing their mission.[227] He remained in contact with his units both by visiting them at the front and through regular reports he received from their commanders.[228] He was therefore kept precisely informed of events on the ground. The case file also contains evidence indicating that Šešelj was informed of crimes committed by a number of volunteers, but that he either failed to react or decided to redeploy them to another area, rather than end their deployment through the same contacts with the official authorities he had relied on for their enrolment.[229] In my opinion, this fact would have had extreme relevance for the determination of his *mens rea*, had the majority deemed it necessary to examine this matter.

140. With regard to the question of Vojislav Šešelj's *mens rea*, I consider that the direct[230] and circumstantial evidence in the case file also proves beyond all reasonable doubt that he assisted and

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[225] *See* para. 347 of the Judgement, wherein the majority examines that fact only in relation to instigation. *See* also P1074, p. 38.

[226] Witness Petković stated that it was impossible for him to make any important decision regarding deployment without the approval of, or an order from, Šešelj, P1074, para. 26. Evidence also establishes that the Accused, as the main commander of the Chetniks, had the "final word" in any decision of the War Staff. P688, paras 59, 97; P634, para. 27. *See* also P1058, under seal para. 21; P1056 under seal, para. 14; C11, pp. 5, 7, 8, 16; C13, pp. 5, 7, 9, 12; P1085, para. 27.

[227] Šešelj even appointed a number of volunteer commanders who had often already received from him the title of *Vojvoda* or obtained it following their mission: C10, p.10. *See* also P217; P128.

[228] *See* evidence already cited in the section on instigation and relating to the knowledge the Accused had of events on the ground. *See* also P688, para. 50; P1074, para. 33; C18, para. 39; C14, p. 46.

[229] P1074, para. 39, the Accused failed to punish Topola even though he had been informed that he had committed crimes in the field.

[230] In August 1991, the Accused had occasion to assert: "I organise interventions by our guerilla organisation, define aims of attack and points that have to be won," P39, p. 3; P 1074, paras 64-76; P258, paras 30-32; P31, p. 500; C10, paras 37, 58; P1058 under seal, paras 45-47. The Chamber received evidence showing that the Accused had promoted perpetrators of crimes to the rank of *Vojvoda*,, even though he had been informed of their acts. *See* P217; P218; C10, para. 39; P213, p. 3; Reynaud Theunens, T(E) 3809, 3810; P688, para. 50. Lastly, an insider witness explains that "Šešelj knew that his speeches and his public appearances could encourage people to do certain things which they would not do otherwise," P1074 para. 36.

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encouraged the SRS volunteers and was aware that he was substantially contributing to the deportation or forcible transfer of non-Serbs from territories which were to become part of "Greater Serbia", and took the risk that the other crimes ascertained by the Chamber (with the exception of the crime of plunder) would be committed. Vojislav Šešelj took that risk not only by making inflammatory speeches, as I have already outlined in my examination on instigation, but also, first and foremost, by failing to insist that the SRS screen the volunteers it recruited, even though the fact that some of the volunteers had criminal records was widely known. He also took this risk by failing to remind the volunteers he was indoctrinating of the requirement to abide by certain basic rules of international humanitarian law,[231] while encouraging them to defend Serbian interests and reminding them of the crimes committed by the Croats during the Second World War. I note here that the chivalric traditions of the Chetniks, to which Vojislav Šešelj also referred in his speeches to the volunteers,[232] are not known for their respect of the laws of armed conflict, particularly during the Second World War.

141. On the basis of the evidence examined in light of the applicable law, I am satisfied that no trier of fact could claim that "perhaps" the Accused was "simply providing legitimate support for the war effort". No reasonable trier of fact could conclude that Vojislav Šešelj was not responsible for aiding and abetting the majority of the crimes committed in the field by the *Šešeljevci*.[233]

VII. CONCLUSION

142. In view of all the evidence in the case file, the Chamber should reasonably have concluded that the Accused incurred responsibility under Article 7 (1) of the Statute in relation to the following counts: Count 1 (Persecution, as a crime against humanity), Count 4 (Murder, as a violation of the laws or customs of war), Count 8 (Torture, as a violation of the laws or customs of war), Count 9 (Cruel treatment, as a violation of the laws or customs of war), Count 10 (Deportation, as a crime against humanity), Count 11 (Inhumane acts (forcible transfer), as a crime against humanity), Count 12 (Wanton destruction of villages, or devastation not justified by military necessity, as a violation of the laws or customs of war) and Count 13 (Destruction or wilful damage done to institutions dedicated to religion or education, as a violation of the laws or customs of war).

[231] According to the evidence, the Accused did not in any way advocate compliance with the Geneva Convention. *See* P1053, paras 9, 13; P1085, para. 29; C18, para. 17; P1074, para. 35.
[232] *See* for example Goran Stoparić, T(E) 2591-2593.
[233] P1053, paras 13, 14; P1074, para. 36; P528, paras 31, 32; C10, para. 28; P1077, para. 20; P01085 under seal, para. 32.

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143. With the Judgement rendered as it stands, the majority intended not only to give an "original" reading of the reasons underlying the armed conflicts which took place in the former Yugoslavia as of 1991 and of the reasons behind some of the "inevitable" atrocities occurring during an armed conflict, which does not fall within its jurisdiction, but it also wished to reinterpret a large part of international humanitarian law applicable in times of armed conflict. In so doing, it showed total disregard, if not contempt, for many aspects of the application and the interpretation of that law as set forth in the case-law of the ICTY and the ICTR.

144. My principle concern with respect to the overall approach of the majority in this case is that it lost sight of what characterises the jurisdiction of a Chamber of the Tribunal, which is to determine whether or not an individual is responsible for violations of international humanitarian law which the Prosecution alleges were committed during the armed conflicts that took place in the former Yugoslavia and in the states which emerged from its disintegration.

145. Whether the evidence shows that some of the acts alleged by the Prosecution were due to the war effort - which, moreover, in the majority's opinion was a defensive war against an "unlawful" secession - or whether it reveals that there were street battles in which some /as printed/

/as printed/ to prove: assumptions such as the one that the common purpose of the JCE alleged by the Prosecution is Greater Serbia and that, therefore, the Prosecution erroneously invokes a political purpose rather than a criminal one; or the assumption that all the problems in the former Yugoslavia originated from the fact that the secession was constitutionally unlawful.

147. Each of these assumptions also obscured the majority's vision of what is at the heart of this case: which is that, as the Accused himself said, "Words can be a very dangerous weapon. Sometimes they can pound like a howitzer,"[234] particularly when, as in the case at hand, those words incite hatred in the very individuals that the instigator has recruited, organised and sent to the battlefield to cleanse the land of the victims of that hatred.

148. Moreover, the Accused seldom denied his violent words, words which completely dehumanised members of the non-Serb communities, but which, according to the majority, expressed "perhaps" nothing more than the violence of war, thus non-criminal violence.

149. In fact, Šešelj was extremely proud of the speech he gave in March 1992 in Mali Zvornik and even repeated to the judges in the *Milošević* Chamber a very abusive term contained in that speech and addressed to Muslims: by correcting the translation of a Croatian interpreter, who had

[234] P1215, pp. 5-6.

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misinterpreted the word *pogan* as "pagan" and by describing himself as a highly educated person who would never have defined the monotheistic Muslims as "pagan", the Accused said: *pogan* in the Serbian language means "faeces".[235]

150. I will conclude this opinion by saying that with this Judgement we have been thrown back centuries into the past, to a period in human history when we used to say – and it was the Romans who used to say this to justify their bloody conquests and the assassinations of their political enemies during civil wars: "*Silent enim leges inter arma.*"[236]

Done in French and English, the French text being authoritative.

Done this thirty-first day of March 2016
Done at The Hague (Netherlands)

/signed/
Judge Flavia Lattanzi

[235] P31, T. 43725.
[236] "In times of war, the law falls silent" (Cicero's *Pro Milone,* 52 B.C.).

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